84-1919

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

RICHARD PARKS, et al.,

Cross-Petitioners,

vs.

MICHAEL A. BELLETIRE, et al.,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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June 5, 1985

152 pp

Question Presented

Whether section 615(e)(2) of the Education for the Handicapped Act, 20 U.S.C. § 1415(e)(2), permits an award of reimbursement of responsible relative liability amounts that parents paid to residential schools on behalf of their handicapped children, where the state's failure to pay full tuition violated the Act.

Parties

The cross petitioners are Richard Parks, Marilyn Parks and Lester Parks, by his parents and next friends, Richard Parks and Marilyn Parks (hereinafter "the Parks family"). They represent themselves and a class of all persons similarly situated.

The respondents in this cross petition are of two groups, first, the state defendants in the prior proceedings, corrected pursuant to Supreme Court Rule 40 for substitution of successors in office, Michael Belletire, Director of the Illinois Department of Mental Health and Developmental Disabilities, Walter W. Naumer, Chairman of the State Board of Education, William L. Kempiners, Director of the Department of Public Health, Gregory

L. Coler, Director of the Department of Public Aid, Gordon Johnson, Director of the Department of Children and Family Services, Robert W. Granzeier, Director of the Department of Rehabilitation Services, Donald G. Gill, State Superintendent of Education, and Patricia Barger, Representative of the Department of Mental Health and Developmental Disabilities to the Governor's Purchases Care Review Board, all of whom, with the exception of Barger, are petitioners in the main petition for writ of certiorari; and Manford Byrd, the Superintendent of Schools of the City of Chicago, who has been substituted pursuant to Supreme Court Rule 40 for the original defendant Ruth B. Love. Byrd has not filed a petition for a writ of certiorari.

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Opinions Below

The opinion of the Seventh Circuit Court of Appeals is reported at 753 F.2d 1397 (7th Cir. 1985). Opinions of the district court are reported at 536 F.Supp. 296 (N.D. Ill. 1982), and 557 F.Supp. 1280 (1983). Appendixes A, PI, and B.

Jurisdiction

The decision sought to be reviewed is that of the Court of Appeals for the Seventh Circuit, dated February 5, 1985. No petition for rehearing was filed. This cross petition is filed pursuant to Supreme Court Rule 19.5. The main petition for writ of certiorari was received on May 6, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions, Statutes and Regulations

20 U.S.C. § 1400

20 U.S.C. § 1401

20 U.S.C. § 1412(2)(B)

20 U.S.C. § 1415(e)

34 C.F.R. § 300.2(b)(3)

34 C.F.R. § 300.302

The text of these provisions may be found in Appendixes D and SP.

Statement of the Case

The State Court Litigation

Lester Parks is an autistic child, who was 15 years of age when the state court litigation Parks v. Illinois Department of Mental Health and Developmental Disabilities was begun. The Chicago

Board of Education (Chicago Board), which had the responsibility for his public education, excluded him from the public schools when he was five. His mother searched for alternative educational settings for him, ultimately applying to the Illinois Department of Mental Health and Developmental Disabilities (DMHDD), on the Chicago Board's advice. The DMHDD placed Lester at New Hope Living and Learning Center, in Waterloo, Illinois, with the Chicago Board's approval.

Because DMHDD had effectuated the placement, it left a responsible relative liability portion of the bill unpaid, $100 per month, pursuant to Ill. Rev. Stat., ch. 91 1/2, § 5-105. Had Chicago Board effectuated the placement without DMHDD's help, there would have been no charge. The Parks family exhausted DMHDD administrative procedures and ultimately initiated state court litigation to chal-

lenge the charge as a violation of the state's duty under the Education for the Handicapped Act, 20 U.S.C. §§ 1400, et seq. (EHA), to provide Lester a free, appropriate education. The trial court found that DMHDD was bound by the Act pursuant to 34 C.F.R. § 300.2(b)(3), and barred DMHDD from assessing the responsible relative liability charge. This order was entered September 12, 1981.

DMHDD appealed. The Appellate Court affirmed on October 18, 1982. Parks v. Illinois Department of Mental Health And Developmental Disabilities, 110 Ill. App. 3d 184, 441 N.E.2d 1209 (1st Dist. 1982). DMHDD filed a petition for leave to appeal to the Illinois Supreme Court, which the Supreme Court rejected on February 1, 1983. No petition for certiorari was filed with this Court.

The Federal Court Litigation

While the state court litigation was pending, New Hope notified the parents of children there that it was about to close. The Parks family requested that DMHDD and the Chicago Board of Education move Lester to a different placement. They did so, placing him in Willowglen Academy in Milwaukee. But because the state court action was an administrative review only of Lester's charges at New Hope, DMHDD refused to apply the court's decision to the new placement. The Parks family attempted to exhaust its remedies under the EHA to compel full payment for the placement, and a state hearing officer ordered the Chicago Board of Education to make full payment in the future, holding, however, that there was no administrative authority to authorize payment of back charges. The Chicago Board ignored the order. Appeals were

filed to the Illinois State Board of Education, which failed to render any decision. The 30 days provided by federal regulation for a decision passed. 34 C.F.R. § 300.512(b). Meanwhile, Willowglen issued a discharge notice.

The Parks family then filed the instant case in federal district court, asking for a preliminary injunction to pay the entirety of Lester's bill at Willowglen to keep him in school, and a classwide, permanent injunction to prevent the charging of responsible relative liability for similar children. The basis for jurisdiction was 20 U.S.C. § 1415(e)(2), and 28 U.S.C. §§ 1331(a) and 1343(c)(3). A preliminary injunction was issued on March 19, 1982. Class certification and summary judgment were granted on February 28, 1983, and a class injunction was entered on June 22, 1983. The injunction was issued as a partial,

final order under Fed. R. Civ. P. 54(b), because other costs charged to parents (certain nursing and school health costs) are still the subject of litigation in the district court.

The court enjoined the defendants from leaving DMHDD responsible relative liability unpaid for handicapped children in private special education placements. "Special education placements" were limited to those placements specifically provided for in the child's Individualized Education Program. The court also required the defendants to pay the back liability charges or reimburse parents for them from September 1, 1978 forward. The defendants appealed to the Seventh Circuit.

The Seventh Circuit panel ruled unanimously that the charges were unlawful, and affirmed the injunction, but modified the monetary relief ordered by the district court. It reversed the decision that

the defendants had to reimburse parents for the amounts that they had wrongfully been required to pay to their children's private schools. Its reasoning was that the EHA did not permit such an award of "damages." The portion of the remedial order that required public payment of parents' unpaid bills was affirmed, however, on the ground that it was not damages, but relief ancillary to the prospective injunction. No petition for rehearing was filed, and the mandate of the Seventh Circuit issued.

The district court recently ordered that a notice be sent to class members advising them to submit proof of indebtedness to the state for payment. A Petition for Writ of Certiorari has been filed by the state defendants, requesting this Court's review of the Seventh Circuit's decision that imposition of the charges on the class violates the EHA.

Reason for Allowing the Writ

I. Introduction

The Seventh Circuit limited the monetary relief in this case to the payment of unpaid back tuition bills to the private schools where the handicapped children in the class had been placed. The court reversed an award of reimbursement for parents who had paid responsible relative liability charges on the ground that the Education for the Handicapped Act (EHA) does not afford monetary relief as a permissible remedy for a violation of the duty to provide a free, appropriate education, absent bad faith or other, unspecified extraordinary circumstances. Tuition reimbursement was thus limited to that which was ancillary to the prospective injunctive order against future violations of the EHA.

The Seventh Circuit, in its decision dated February 5, 1985, was acting without the benefit of this Court's decision in Burlington School Committee v. Department of Education, 53 U.S.L.W. 4509 (U.S., 1985), which came down April 29, 1985. The Seventh Circuit's decision is directly contrary to that decision both in its holding and its reasoning.

II. Argument: The Seventh Circuit's Restrictions on Relief Conflict Directly with this Court's Holding in Burlington School Committee.

The Seventh Circuit ruled that 20 U.S.C. § 1415 did not create a right to seek monetary relief, at least in the absence of bad faith or other extraordinary circumstances. In construing § 1415(e)(2)'s provision that the court is to "grant such relief as the court determines is appropriate," the court said that "the civil action created by subsection (e) (2) may have been intended merely to authorize judicial review of agency action, and not to create a right

to seek damages." 753 F.2d 1397, 1407 (7th Cir. 1985), Appendix A-15. The court rejected any distinction between reimbursement of tuition that parents had paid and general damages. 753 F.2d at 1408, Appendix A-18.

This Court held directly to the contrary in Burlington School Committee. Holding that tuition reimbursement was an appropriate remedy where, as here, the placement of the child had been determined to be appropriate within the meaning of the EHA, the Court declared:

> [W]e are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy ....

53 U.S.L.W. at 4512. The Court reasoned, in part, that this rule was necessary in order to secure the guarantee of a free appropriate education. Id. This Court did not require any showing of bad faith or other extraordinary cir-

cumstances. Moreover, the Court stressed the distinction between "damages" and mere tuition reimbursement:

> In this Court, the Town repeatedly characterizes reimbursement as "damages," but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along ....

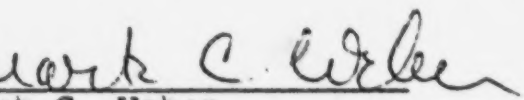
Id.

The Seventh Circuit's ruling with respect to the reimbursement relief is thus in direct conflict with the ruling of this Court in Burlington School Committee. If any review is granted on the Main Petition, cross-petitioners submit that a proper result would to be summarily reverse or vacate the decision, only to the extent that it conflicts with Burlington School Committee, and to remand the case for reconsideration in light of that decision. If full review is granted on the Main Petition, cross-petitioners request review on the question here presented.

CONCLUSION

For the foregoing reasons, if review is granted on the Main Petition for Certiorari, it should also be issued on this Cross-Petition, either to summarily reverse in part or vacate in part, and remand; or, if full review is granted on the Main Petition, to fully consider the question here presented.

Respectfully submitted,



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June 5, 1985

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-2391, 83-2448, 83-2567

RICHARD PARKS, MARILYN PARKS, and LESTER PARKS by his parents and next friends, RICHARD PARKS and MARILYN PARKS; on their own behalf, and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

IVAN PAVKOVIC, Director, Department of Mental Health and Developmental Disabilities, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 0965—Prentice H. Marshall, *Judge.*

ARGUED OCTOBER 1, 1984—DECIDED FEBRUARY 5, 1985

BEFORE CUMMINGS, *Chief Judge,* and BAUER and POSNER, *Circuit Judges.*

POSNER, *Circuit Judge.* This is a class action by handicapped children and their parents, under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, against the directors of various Illinois state agencies. The state—as we shall refer to the defendants collectively, because they are sued in their official capacities—appeals from the district judge's grant

of injunctive and monetary relief to the class represented by the plaintiffs named in the complaint (Lester Parks and his parents).

Lester Parks is now 19 years old, but because of various (nonphysical) afflictions such as autism and mental retardation, he functions on the level of a 3-6 year old. He is indisputably a handicapped child within the meaning of the Education for All Handicapped Children Act, which requires participating states such as Illinois to offer all handicapped children between the ages of 3 and 21 (with immaterial exceptions) "a free appropriate public education." 20 U.S.C. § 1412(1); see generally *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). The term includes both "special education and related services," 20 U.S.C. § 1401(18), the former meaning "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including . . . instruction in hospitals and institutions," § 1401(16); the latter meaning "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education," § 1401(17).

In 1980 Lester was in a private institution called New Hope Living and Learning Center. The state reimbursed his parents for all of the instructional and living expenses charged by New Hope except for $100 of his monthly living expenses. (We shall use the term "living expenses" to denote room and board, clothing, and other such noninstructional expenses, whether incurred in private residential institutions or private day schools.) The state defends the deduction on the ground that it had placed Lester in New Hope not because he had special educational needs but because he had a "developmental disability," meaning "a disability which is attributable to: (a) mental retardation, cerebral palsy, epilepsy or autism; or to (b)

any other condition which results in impairment similar to that caused by mental retardation and which requires services similar to those required by mentally retarded persons." Ill. Rev. Stat. 1981, ch. 91 1/2, ¶ 1-106. Illinois law requires the parents of a child who is placed in a private facility to pay a maximum of $100 a month toward the costs of the facility (the maximum is not reached until the family has an annual income of $15,600) if the child was placed there pursuant to a determination by the state that he required such placement because he was developmentally disabled rather than because he needed a special education within the meaning of the Education for All Handicapped Children Act. See Ill Rev. Stat. 1981, ch. 91 1/2, ¶ 5-116; Ill. Admin. Code, ch. I, § 226.420(c).

Lester's parents complained to the responsible state agency, and on appeal to the Illinois state courts won a judgment requiring the state to pay New Hope's bills in full. See *Parks v. Illinois Dept. of Mental Health & Developmental Disabilities*, 110 Ill. App. 3d 184, 441 N.E.2d 1209 (1982). That litigation finally ended on February 1, 1983, when the Illinois Supreme Court denied the state leave to appeal. Meanwhile Lester had been moved in 1980 to another private institution, Willowglen Academy, and again his parents were required to pay $100 a month toward his living expenses and again they complained to the state agency. A hearing officer ordered the state to pay Willowglen's future bills in full but did not order it to reimburse the Parkses for their unpaid Willowglen bills, which had mounted up above $2,000. The Parkses appealed the hearing officer's decision to the next level of administrative review. When the appeal was not decided within the time required by federal law, the Parkses, having thus exhausted their administrative remedies, and facing a discharge notice from Willowglen, brought this suit in federal district court early in 1982 under 20 U.S.C. § 1415(e)(2). This section of the Education for All Handicapped Children Act authorizes anyone aggrieved by a

decision made by a state in administering the Act to bring a civil action in state or federal court after exhausting his state administrative remedies, and directs the court to "grant such relief as the court determines is appropriate." The complaint alleged that the state was violating both the Education for All Handicapped Children Act and section 504 of the Rehabilitation Act by refusing to pay for Lester's living expenses. The complaint asked for a preliminary injunction ordering the state to pay the accumulated bill from Willowglen so that Lester would not be expelled before trial, and a permanent injunction forbidding the state to deduct any part of Lester's living expenses in the future (till he reaches 21).

The district court granted the preliminary injunction in March 1982, 536 F. Supp. 296, 313 (N.D. Ill. 1982), and the state complied with the injunction. In February 1983 the district court certified the Parkses' suit as a class action on behalf of all handicapped children (apparently some 600 in all) whose living expenses (up to $100 a month) the state requires the parents to pay on the ground that the children have been institutionalized because they are developmentally disabled rather than because they need special education. 557 F. Supp. 1280 (N.D. Ill. 1983). A few months later the court permanently enjoined the state from requiring such payments and also entered a purported final judgment under Rule 54(b) of the Federal Rules of Civil Procedure ordering the state to reimburse the class members for living expenses that the state had refused to defray since 1978, when the pertinent provisions of the Education for All Handicapped Children Act took effect. The court did not compute the amount of reimbursement due; we were told at argument that the total is between $1.5 million and $3 million.

The state appeals from both the permanent injunction and the order regarding reimbursement. We must first decide whether we have appellate jurisdiction. We shall begin with the order to reimburse living expenses; as will appear, the appealability of the permanent injunction is not problematic, even if that injunction is not itself a final order.

A district judge does not have carte blanche to certify an order for an immediate appeal under Rule 54(b). The order must finally dispose of a separate claim or a separate party. Normally an order that merely decides liability and leaves the determination of damages to future proceedings does not finally dispose of any claim; it is just a preliminary ruling on the plaintiff's damage claim. E.g., *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976); *Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, 721 F.2d 629, 630 (7th Cir. 1983); *Weiss v. York Hospital*, 745 F.2d 786, 802-03 (3d Cir. 1984); *Garzaro v. University of Puerto Rico*, 575 F.2d 335, 337 (1st Cir. 1978); cf. *Harris v. Goldblatt Bros., Inc.*, 659 F.2d 784, 786 (7th Cir. 1981). But if the determination of damages will be mechanical and uncontroversial, so that the issues the defendant wants to appeal before that determination is made are very unlikely to be mooted or altered by it—in legal jargon, if only a "ministerial" task remains for the district court to perform—then immediate appeal is allowed. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 and n. 5 (1980); *Gulf Refining Co. v. United States*, 269 U.S. 125, 136 (1925); *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 826 (7th Cir. 1984); *Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, *supra*, 721 F.2d at 631; *United States v. Hughes*, 585 F.2d 284, 286 (7th Cir. 1978); *St. Louis Shipbuilding & Steel Co. v. Casteel*, 583 F.2d 876 and n. 1 (8th Cir. 1978); *Love v. Pullman Co.*, 569 F.2d 1074, 1076 (10th Cir. 1978); *Hattersley v. Bollt*, 512 F.2d 209, 213-14 (3d Cir. 1975); cf. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 216 n. 8 (1977). For if the further proceedings in the trial court are quite unlikely to make the appeal moot or even affect the issues on appeal, there is no reason to delay the appeal while they are resolved; and the delay may be a source of cost.

The line between the ministerial and the substantial is a very dim one, but we think this case falls on the ministerial side, if barely. It is not like *Strey v. Hunt Int'l Resources Corp.*, 696 F.2d 87 (10th Cir. 1982) (per curiam), where the order that was sought to be appealed determined the total damages of the class but did not indicate

how they were to be divided among the members, or *Norwood v. Harrison*, 563 F.2d 722 (5th Cir. 1977) (per curiam), where the order fixed the damages but did not say who had to pay them. Here all that remains to be done in the district court is for the members of the class to submit receipts or other evidence showing what they have paid or still owe the institutions; and the district judge made clear that the defendant agencies would be jointly and severally liable to the class members for whatever amounts are shown to be due. See 557 F. Supp. at 1290. Although computing the money owed each class member is not automatic, it is mechanical, is unlikely to engender dispute or controversy, and will require no analytic or judgmental determinations that might affect the questions now before us or give rise to other appealable questions; in particular, the district court will not have the problem of dividing up a pie among competing claimants whose claims in the aggregate exceed the pie. But at the same time, the processing of the individual class members' claims will not be costless, so that if this appeal is allowed and the state persuades us that no damages should be awarded, an expensive computation involving thousands of bills will be avoided. If the district court's order is upheld, still nothing will have been lost by the appeal. For in the unlikely event that any appealable issues arise in computing each class member's damage entitlement, they will not be factually similar to those raised by the present appeal, so there will be no judicial diseconomy if they are considered in a separate appeal.

We conclude that the order directing the state to reimburse (in an as yet undetermined amount) the parents of the class members is properly before us—though this conclusion owes nothing to Rule 54(b). For so far as we can tell nothing remains pending in the district court except calculating the actual amount owed each class member, which as we have said is not the resolution of a separate claim but merely the disbursement stage following what we have determined to have been the final judgment on damages.

Even if we are wrong in thinking that the order to pay is a final, appealable order, we can review it in

conjunction with the state's appeal of the permanent injunction. When an order in a case is properly appealed, the court of appeals can consider a closely related order if considering them together is more economical than postponing consideration to a subsequent appeal. See, e.g., *Bittner v. Sadoff & Rudoy Industries*, *supra*, 728 F.2d at 826-27; *Jenkins v. Blue Cross Mutual Hospital Ins., Inc.*, 522 F.2d 1235, 1237-38 (7th Cir. 1975), modified en banc on other grounds, 538 F.2d 164 (1976); *McKnight v. Blanchard*, 667 F.2d 477, 480-81 (5th Cir. 1982). Although this doctrine is subject to abuse of the tail-wagging-the-dog variety, which has led to its being given a circumscribed application well illustrated by *Kershner v. Mazurkiewicz*, 670 F.2d 440, 448-49 (3d Cir. 1982) (en banc), none of the limiting factors is present here. The only question we need consider—one we must decide anyway, to satisfy ourselves that we have jurisdiction over the entire appeal—is whether the permanent injunction is appealable. If so, the order to pay is sufficiently closely related to it to be appealable along with it even if not itself a final order.

Permanency and finality are not the same thing. The pendency of an unresolved damage issue could deprive a permanent injunction of its finality, in which event it would not be appealable under 28 U.S.C. § 1291. But 28 U.S.C. § 1292(a)(1) allows the immediate appeal of an interlocutory order granting an injunction, and the injunction need not be a preliminary one. The statute does not distinguish between preliminary and permanent injunctions; and beginning with *Smith v. Vulcan Iron Works*, 165 U.S. 518 (1897), many cases have allowed orders granting permanent injunctions to be appealed under section 1292(a)(1) or its predecessors. See 16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure § 3924, at pp. 67-79 (1977); *id.*, 1983 Pocket Part § 3924 (1984). Only when the denial of a request for a permanent injunction is not definitive (for example, because the district judge has merely denied the plaintiff's motion for summary judgment, and the plaintiff may

still get the injunction at the conclusion of the trial) is it not appealable under section 1292(a)(1). See, e.g., *Switzerland Cheese Ass'n, Inc., v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *Donovan v. Robbins*, Nos. 84-1287 et al., slip op. at 2-10 (7th Cir. Jan. 3, 1985). Grants of permanent injunctions always are. See, e.g., 16 Wright, Miller, Cooper & Gressman, *supra*, § 3924, at p. 67; *Schulner v. Jack Eckerd Corp.* 706 F.2d 1113, 1114 (11th Cir. 1983) (per curiam); *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 584 n. 49 (D.C. Cir. 1980).

Although we thus have appellate jurisdiction, we must consider the state's argument that the suit became moot before it was certified as a class action. The state argues that its dispute with the Parkses ended on February 1, 1983—almost a month before the class certification—when the Illinois Supreme Court denied the state leave to appeal the state-court judgment requiring the state to reimburse Lester's living expenses at New Hope. Yet the state continued to refuse to pay Lester's living expenses at Willowglen, where he had been moved to. The refusal was not a contempt of the state court, because that court had not issued an injunction. It had no power to issue one (see Ill. Rev. Stat. 1981, ch. 110, ¶ 275); all it could do was order the state to pick up Lester's full tab at New Hope. Faced with the apparent determination of the state to keep on fighting, the Parkses turned to the district court and got a preliminary injunction ordering the state in effect to pay the arrears at Willowglen as well. If the state had thrown in the towel at this point and agreed not only to pay the Parkses' arrears at Willowglen but, for the future, to stop deducting any part of Lester's monthly expenses, and if the district court had been persuaded of the state's sincerity, the case would have been moot and the court could not have gone on to certify it later as a class action. See *Sosna v. Iowa*, 419 U.S. 393, 402 (1975); *Indianapolis School Comm'rs v. Jacobs*, 420 U.S. 128 (1975) (per curiam); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1046 (5th Cir. 1981). It is

true that a case in this circuit holds that if the defendant "buys off" the named plaintiff while a motion for class certification is pending, the case may not be moot. See *Susman v. Lincoln American Corp.*, 587 F.2d 866, 870 (7th Cir. 1978); cf. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398-404 (1980). Otherwise defendants could postpone certification until the statute of limitations ran, simply by buying off in succession the class members who stepped forward as named plaintiffs—for every time the named plaintiff was bought off, the suit would have to be dismissed. But there is no suggestion that this is what happened here. Indeed, at no time till the filing of the state's reply brief in this court did the state indicate that its dispute with the Parkses is over.

Moreover, even if today that dispute is finally over, the class action would not be moot unless the dispute was over before the class was certified back in February 1983; and the evidence is against such an inference. The state filed a notice of appeal from the preliminary injunction at the same time that it filed its notice of appeal from the permanent injunction and order to pay, which was in July 1983, months after the class had been certified. A notice of appeal filed more than a year after the order sought to be appealed is a legal nullity, and in any event the state never briefed its appeal from the preliminary injunction and we consider it thoroughly abandoned. But the only important point is that after the class was certified, the state, by appealing from the preliminary injunction, gave an objective indication that it was still at war with the Parkses and not just with the class. Maybe in its heart of hearts the state had conceded the validity of Lester's claim (though not that of the members of the class) back in February. But to make the case moot the state would have had to communicate its change of heart to the Parkses or the district court—which it has never done—in order to give the attorneys for the class a chance to find a substitute class representative. A case does not become moot because one of the parties, while continuing to take all the steps that a live adversary would take to assert his

rights, has secretly concluded that come what may he will give his opponent everything the opponent seeks. And even now it is unclear whether the state has committed itself to continue paying Lester's living expenses.

The state also argues that the judgment in the Parkses' state-court action was res judicata and hence bars the present suit. This is clearly wrong. The Parkses could neither have joined with their action for administrative review a claim for an injunction or for reimbursement of their past expenditures—the state court, as we said, did not have the power to grant such relief—nor have bypassed the administrative-review process and brought their first and only suit in federal district court. See 20 U.S.C. §§ 1415(b), (c), (e)(2). The administrative-review proceeding was no substitute for an action seeking equitable and monetary relief under the Education for All Handicapped Children Act, and "a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding." 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4412, at p. 93 (1981); see Restatement, Second, Judgments § 24, comment g; § 26, comment c (1980).

The Parkses' collateral estoppel argument is as unavailing as the state's res judicata argument. They argue that the state should be estopped to deny that it has violated the Act, since the state court found that it had violated the Act. But the state court relied very heavily on the district court's first opinion in this case, and a court cannot use its own preliminary-injunction findings to estop a party to contest those findings at the trial on the merits. See, e.g., *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). In any event, if the Parkses wanted the district court to invoke collateral estoppel "offensively," that is, to bar the state's defending itself against their suit, they had to ask the district court, and they did not. Since the doctrine of offensive collateral estoppel requires an exercise of "broad discretion" by the district court, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979), it cannot be applied in the first instance by the appellate court except in the clearest of cases, which this obviously is not.

We come at last to the question whether the permanent injunction was proper. This depends on whether the state has violated the Education for All Handicapped Children Act by requiring parents to pay any part of the living expenses of handicapped children who are placed in a private facility on the ground of developmental disability rather than of educational need. The issue can be focused by considering a series of hypothetical cases. In the first, a deaf and blind child, perfectly capable of living at home, is institutionalized on the basis of a judgment that he can get a better education in a more controlled environment. His living expenses in the institution would be expenses of his special education within the meaning of the Act and his parents would be entitled to reimbursement for them. It is true that the Act does not specify room and board in residential institutions as components of a "free" public education, that "special education" is defined as "instruction," and that the detailed list of "related services" does not include room and board. But the fact that "special education" covers education in institutions (including hospitals, which are primarily residential institutions), 20 U.S.C. § 1401(16), and that "related services" covers transportation, § 1401(17), suggests that Congress took for granted that room and board were components of a free public education when the education had to be conducted in a residential institution, and mentioned transportation separately in order to make clear that the expense of commuting to a day school would also be covered. And however the statute should be interpreted as an original matter, Illinois does not challenge the validity of the federal regulation that explicitly requires reimbursement of the child's living expenses in an educational institution. See 34 C.F.R. § 300.302; *Doe v. Anrig*, 692 F.2d 800, 810 n. 20 (1st Cir. 1982) (overruled on other grounds in *Doe v. Brookline School Comm.*, 722 F.2d 910 (1st Cir. 1983)); *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir. 1983).

In our second hypothetical case, the child is in a coma, and is institutionalized because he cannot be cared for at

home. We understand the plaintiffs to be conceding (and the Supreme Court's opinion in *Rowley* implies, see 458 U.S. at 202-03) that since the child would be completely uneducable in his condition—since he could not benefit from special education no matter how expensive—his living expenses in the institution would not be chargeable to the state under the Act. They would not be expenses of or related to education, made pursuant to the "individualized education program" that the law requires the state to create for each handicapped child. See 20 U.S.C. §§ 1401(18), 1412(4), 1414(a)(5).

In the third case, an intermediate case that is similar but not identical to this case, the child cannot be cared for at home because of some purely physical problem, but, because of that problem, neither can he be educated unless he is institutionalized. See *Irving Independent School District v. Tatro*, 104 S. Ct. 3371, 3378 n. 11 (1984). Maybe he requires continuous medical attention which he could not get in a regular day school. So he must be institutionalized for educational reasons but equally for medical reasons. If one analogized the failure to reimburse the living expenses of such a child to a common law tort, the conclusion would be that the state was not liable for them; if the child will have to live in an institution anyway, regardless of his educational needs, those living expenses are not caused by his educational needs, for they will be incurred whether or not any effort is made to educate the child. Cf. *New York Central R.R. v. Grimstad*, 264 Fed. 334 (2d Cir. 1920); *Weeks v. McNulty*, 101 Tenn. 495, 48 S.W. 809 (1898); Prosser and Keeton on the Law of Torts § 41, at pp. 265-66 (5th ed. 1984). But the Education for All Handicapped Children Act is not a tort statute, and to read it as one would lead to the odd result that the more the child's handicap interfered with his living, and not just with his education, the more his parents would have to pay. This result is inevitable to some extent; if the child is so far handicapped as to be unconscious, and is thus wholly uneducable, he falls outside the protection of the

Act even though his handicap is more rather than less severe than that of the children protected by the Act. And even within the class of those children who are educable, it can be argued that the limited funds allocated for the education of the handicapped could be employed more productively on a child likely to make real educational progress with their assistance than on one too severely retarded to benefit much at all.

However these considerations might seem to balance out as an original matter, the courts that have considered the question have rejected the argument that a state can avoid its obligations under the Act by showing that the child would have had to be institutionalized quite apart from educational needs that also required institutionalization. See *Kruelle v. New Castle County School District*, 642 F.2d 687, 693-96 (3d Cir. 1981); *Gladys J. v. Pearland Independent School District*, 520 F. Supp. 869, 876 n. 8 (S.D. Tex. 1981); and other cases cited in Note, *Defining the Scope of Residential Placement and Related Services Under the EHA: Difficult Questions Left Unanswered in Illinois—In re Claudia K.*, 32 DePaul L. Rev. 483, 510-11 n. 132 (1983). And this is an easier case for liability. It is not true, or at least not proved, that Lester and the other members of the class are in such a condition that they could not be kept at home even if no one were concerned with their educational needs. The basic meaning of developmentally disabled in the Illinois statute, as in the professional literature, see, e.g., Thompson & O'Quinn, Developmental Disabilities, ch. 1 (1979), is mentally retarded; and parents who are indifferent to the mental deficiencies of their severely retarded child can raise the child quite comfortably at home—it is as if the child's infancy were prolonged. In light of the close connection between mental retardation and special educational need, it comes as no surprise that developmental disability, far from being an exempted category, is an important subcategory of the handicaps covered by the Act. Although the Act does not use the term developmental disability, it defines "handicapped children" to include

children who are "mentally retarded," or are "seriously emotionally disturbed," or are "other[wise] health impaired," or have "specific learning disabilities." 20 U.S.C. § 1401(1). And the regulations under the Act (whose validity the state, again, does not challenge) make clear that these terms include such conditions as autism, brain injury, epilepsy—and in fact everything else that comes within the state statute's, and the profession's, definition of developmentally disabled. See 34 C.F.R. §§ 300.5(b)(4), (b)(7), (b)(9). A later federal statute, the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000 *et seq.*, does use the term "developmental disability" and provides additional assistance for these unfortunate people, in this respect supplementing the Education for All Handicapped Children Act. See 42 U.S.C. § 6000(b)(2)(A). But there is no suggestion that Congress thought they had been excluded from the earlier Act; they manifestly had not been.

So what the State of Illinois has done is to carve out a class of handicapped children and deny them the full reimbursement that the Education for All Handicapped Children Act, as authoritatively construed in a regulation that the state does not challenge, entitles them to. True, it does this only in cases where the child is placed in a residential facility "because" he is developmentally disabled, rather than "because" he is handicapped and needs special education. But in light of what developmental disability means, the distinction between these causes is purely verbal. To assign a person to a residential facility because his mind is backward is, except perhaps in the severest cases, to assert a need for special education. With persons as severely retarded as Lester Parks the scope for education is extremely limited, but we do not understand the state to be arguing that Lester or the other members of the class are uneducable. Nor would such an argument be likely to succeed (see, e.g., *Abrahamson v. Hershman*, *supra*, 701 F.2d at 228); 3-6 year olds are educable. The state might as well have said, we choose to classify as developmentally disabled those children whose only need is for special education.

The next question is the propriety of the damages remedy. The Education for All Handicapped Children Act

creates a private right of action against state agencies (the parties agree that in naming the heads of the various state agencies as the defendants in this case the plaintiffs meant to sue the agencies, not the defendants in their individual capacities, cf. *Brandon v. Holt*, 53 U.S.L.W. 4122 (S. Ct. 1985)), which means, against the state; and the court (state or federal) is to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). There is no reference in either the statute or the legislative history to damages. We think the omission is significant. It is true that since the Act was passed "in order to assure equal protection of the law," 20 U.S.C. § 1400(b)(9); see *Smith v. Robinson*, 104 S. Ct. 3457, 3468-70 (1984)—which is to say under the authority granted to Congress by section 5 of the Fourteenth Amendment—the Act would not violate the Eleventh Amendment if it provided a damage remedy against the state. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). But that does not answer the question whether it does provide such a remedy. Mindful of the frictions that arise whenever the states' historical immunity from suit in federal court is withdrawn, the Supreme Court has told us to require a clear showing of congressional intent before we conclude that it has been. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 343-44 (1979). But this directive cannot carry the day for the state. The purpose of sovereign immunity is to protect the public fisc; and having explicitly authorized suits against the states for "appropriate relief" that will often require state expenditures, Congress in the Education for All Handicapped Children Act may be thought to have abrogated that immunity explicitly.

On the other hand, the subsection on judicial relief appears in a section captioned "Procedural Safeguards," 20 U.S.C. § 1415, and is stated in terms of the rights of a "party aggrieved." This suggests that the civil action created by subsection (e)(2) may have been intended merely to authorize judicial review of agency action, and not to create a right to seek damages. Jurisdiction to review agency action is frequently given to district courts,

especially where, as here, the action is informal in character. See, e.g., *Illinois Dept. of Public Aid v. Schweiker*, 707 F.2d 273, 276-78 (7th Cir. 1983); *Rockford League of Women Voters v. Nuclear Regulatory Comm'n*, 679 F.2d 1218, 1221 (7th Cir. 1982); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1 (1975). It seems unlikely, moreover, that a majority of the Congress would have wanted to authorize federal courts to impose on the states potentially heavy monetary liabilities at the behest of private plaintiffs, especially when injunctive relief alone, directed as it usually will be to requiring the states to maintain expensive programs, will impose such liabilities indirectly. It is not as if the Act had been passed to eliminate traditionally wrongful practices. That participation in the Act is voluntary is some evidence that a state's refusal to devote much greater resources to educating handicapped than normal children is not such morally wrongful conduct as Congress could be expected to make tortious by creating an automatic damage remedy. If such refusal is discriminatory, it is discriminatory in a special (if frequent modern) sense: not as a refusal to treat equally, but as a refusal to rectify a natural inequality (that between the educability of a handicapped and a normal child) by devoting more resources to the victims of the inequality.

Although it could well be concluded that there is no damage remedy at all under the Education for All Handicapped Children Act, no court has yet embraced this conclusion (the issue is an open one in the Supreme Court, see *Smith v. Robinson*, *supra*, 104 S. Ct. at 3473 n. 24)); nor need we do so in order to decide this case. The courts of appeals that have indicated (always in dictum) that damages might be available under the Act limit that availability to circumstances more extraordinary than those in this case. See *Anderson v. Thompson*, 658 F.2d 1205, 1213-14 (7th Cir. 1981) (physical danger to child, or bad faith by state); *Miener v. Missouri*, 673 F.2d 969, 980 (8th Cir. 1982). Although two district court decisions

evince a more liberal approach, see *Gregg B. v. Board of Education*, 535 F. Supp. 1333, 1338-39 (E.D.N.Y. 1982); *Monahan v. Nebraska*, 491 F. Supp. 1074, 1094 (D. Neb. 1980), modified on other grounds, 645 F.2d 592 (8th Cir. 1981), the approach taken in *Monahan* was implicitly rejected by the district judge's circuit in *Miener*.

That does not end our inquiry into the propriety of the district court's giving the plaintiffs *some* monetary relief. A court of equity can issue orders, monetary in character, that are ancillary to its equitable judgments, and the power is not limited to such obvious examples as contempt and attorney's fees for resistance to the judgment. See, e.g., *Alexander v. Hill*, 707 F.2d 780, 783 (4th Cir. 1983). This principle is applicable to the present case even if, as we have suggested might well be the case, section 1415(e)(2) was intended merely to create an avenue for judicial review of agency action (here the action of the state in refusing to reimburse the living expenses of the handicapped children in full). Such review is equitable in nature, see, e.g., *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610, 613 (7th Cir. 1983) (en banc), whether or not exercised (as here) to enjoin the agency, and it therefore includes the power to formulate whatever remedies are necessary to make judicial review effective. See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187-88 (1941); *Indiana & Michigan Elec. Co. v. FPC*, 502 F.2d 336, 346-48 (D.C. Cir. 1974); *Reich v. Webb*, 336 F.2d 153, 158 (9th Cir. 1964). On this ground an order to pay the outstanding bills of the parents of handicapped children strikes us as a proper incident (though barely so) to the injunctive relief ordered by the district court. If the state refuses to pay and the parents cannot come up with the money, their children will be ordered out of the institutions. The permanent injunction will be thwarted —all the more clearly since the institutions will not take the children back so long as their bills are unpaid. In authorizing the district court to provide appropriate relief, Congress must have intended that the court be able to do what was reasonable and necessary to make sure that

handicapped children receive the services to which the Act entitled them.

"Necessary," however, exaggerates what the district court did here. Living expenses are charged in the amount of $100 a month only against families with annual incomes of at least $15,600, though this is hardly affluence, and though $100 a month is not a trivial amount for a family whose entire income is less than $16,000 a year. But even if most of the class members could pay the past-due bills for living expenses, we do not think the district judge exceeded the limits of his equitable discretion by requiring the state to pay off these old bills, for an illegal charge, rather than forcing the parents to dig down into their pockets for what could be, to them, sizable lump-sums.

His order, however, has a much broader sweep. It directs reimbursement of all the expenses that the parents have paid back to 1978. This part of the order cannot be justified as necessary to prevent the children from being expelled from the institutions in which they are receiving their special education. The plaintiffs argue, however, that (1) all they are seeking is reimbursement of certain expenses, not full common law damages; (2) in other words, they are just asking for restitution; (3) it is more than justified by the egregious nature of the state's violation. The first point is correct, but we do not think the statute creates an automatic right of reimbursement any more than it creates an automatic right of common law damages. Calling what they are asking for "restitution" does not strengthen the plaintiffs' case. Indeed, since restitution, being measured by the wrongdoer's profit rather than the victim's loss, can result in a larger money judgment than damages, see, e.g., Dobbs, Handbook on the Law of Remedies 223 (1973), and partly for this reason is often reserved for the more serious types of wrongdoing, it is even less likely that Congress intended to subject the states to open-ended liability in suits for restitution than to make them subject to suits for damages. The plaintiffs' second and third points we reject.

Restitution in the only sense in which it might be thought to add a moral weight to the plea for reimbursement refers to the situation where the defendant has been unjustly enriched at the plaintiff's expense. See *Iconco v. Jensen Construction Co.*, 622 F.2d 1291, 1295 (8th Cir. 1980); *S.S. Silverblatt, Inc. v. East Harlem Pilot Block—Building 1 Housing Development Fund Co.*, 608 F.2d 28, 37 (2d Cir. 1979); 1 Palmer, The Law of Restitution § 1.1 (1978); cf. *Hurry v. Jones*, 560 F. Supp. 500, 508 (D.R.I. 1983). That might be the situation here if Illinois had taken the plaintiffs' money and used it for some activity unrelated to the needs of handicapped children. But there is no argument that anything of this sort has occurred. So far as appears, any money that the state saved by not fully reimbursing the parents of handicapped children has gone into programs for the benefit of those children. And finally we do not think the state's behavior was egregious. The state has an arguable position; we have rejected it, but it is not therefore insubstantial.

We conclude that the district judge erred in ordering reimbursement of the parents' overpayments beyond what was necessary to clear outstanding bills that unless paid would cause the handicapped children to be expelled from the institutions in which the state had placed them. Of course this favors those parents who have paid their bills over those who have not, but presumably the latter are, on average at least, more necessitous and not just less responsible.

The plaintiffs cite as an alternative basis for monetary relief section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Although they concede as they must in light of *Smith v. Robinson*, *supra*, that the more detailed provisions of the Education for All Handicapped Children Act supersede section 504 within the later Act's domain and thus extinguish any separate damages claim since 1978, they argue that section 504 allows them to get damages back to 1977 (we do not know why this was made the damage cut-off date). Passing the murky question of just what pecuniary remedies section 504 provides, we do not

interpret it to force states to create special programs for handicapped children. Section 504 merely provides that "no *otherwise qualified* handicapped individual in the United States, . . . shall, *solely by reason of his handicap*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." (emphasis added). This protects a handicapped person from being denied the same benefit (a job, or whatever) as a normal person but does not require the state to devote extra resources to bringing the handicapped up to the level of the normal. See *Southeastern Community College v. Davis*, 442 U.S. 397, 405, 411-13 (1979).

Lastly, the state complains about the district court's including in the decree the Governor's Purchase Care Review Board. Although the Board's relationship to the decisions that resulted in the denial of reimbursement to the parents of handicapped children for living expenses is obscure, the district judge was justified in including the Board in the decree to make sure that the decree is not thwarted by the omission of a state agency that might by inaction hamper the carrying out of its provisions.

To summarize, the permanent injunction is affirmed, as is the part of the district court's order concerning monetary relief that directs the state to pay the outstanding bills of the class members for living expenses. However, the part of that order that directs the state to reimburse the class members for the bills that they have already paid is reversed. No costs shall be awarded in this court, and Circuit Rule 18 shall not apply to the further proceedings in the district court.

AFFIRMED IN PART AND REVERSED IN PART.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Richard PARKS, Marilyn Parks, Lester Parks, by his parents and next friends, Richard Parks and Marilyn Parks, on their own behalf and on behalf of all others similarly situated, Plaintiffs,

v.

Ivan PAVKOVIC, Director, Department of Mental Health and Developmental Disabilities, Edward Copeland, Chairman, Illinois State Board of Education, Ruth Love, Superintendent, Chicago Public Schools, Patricia Barger, Representative, Department of Mental Health and Developmental Disabilities, Robert Mandeville, Director, Bureau of the Budget, William Kempiners, Director, Department of Public Health, Jeffrey Miller, Director, Department of Public Aid, Gregory Coler, Director, Department of Children and Family Services, Robert Granzeier, Acting Director, Department of Vocational Rehabilitation, Donald Gill, State Superintendent of Education, individually and in their official capacities, Defendants.

No. 82 C 965.

United States District Court,
N.D. Illinois, E.D.

Feb. 28, 1983.

Severely emotionally disturbed child and his parents brought action against state of Illinois and several state agencies alleging that state, through its agencies, was depriving handicapped child of his right to free appropriate public education. The District Court, Prentice H. Marshall, J., held that: (1) class consisting of all handicapped Illinois children between ages of three and 21 and their parents who had been refused full funding for private special educational placement as result of state policy of assessing portion of special education costs

designated as responsible parent liability would be certified; (2) Department of Mental Health and Developmental Disabilities was bound by terms of Act; (3) Illinois statutory scheme was not necessary to enable state to fulfill its obligations under Fourteenth Amendment; (4) Illinois statutory scheme was in conflict with federal law and invalid under supremacy clause; (5) Illinois State Board of Education, Department of Mental Health and Developmental Disabilities, Governor's Purchased Care Review Board, and Chicago Board of Education were all liable for violation of Act; and (6) order requiring defendants to reimburse plaintiffs for costs assessed against them as responsible relative liabilities was appropriate.

Order accordingly.

* * *

MEMORANDUM OPINION

PRENTICE H. MARSHALL, District Judge.

This is a disturbing case. Plaintiffs have brought to our attention one of the most blatant violations of federal law imaginable. It appears that the State of Illinois has been openly violating the rights of handicapped children. Defendants, instead of promptly moving to correct the problem, or even arguing that they have complied with federal law, defend this case almost entirely by finger-pointing. Each state and local agency involved in this case does little more than claim that it is not responsible for the plight of handicapped children in Illinois, and urges the court to pin the blame elsewhere. While this bureaucratic infighting rages, none of these public servants before the court seem concerned about finding a way to remedy the problem. That is a task that must, by default, fall on this court. We now undertake it.

THE FACTS

Named plaintiff Lester Parks is a severely emotionally disturbed child in need of special education and related

services. Because he is so severely disabled, he must be placed in a residential facility which can provide him with the intensive educational and support services that he needs. In early 1980, Lester's parents became fearful that the facility in which he then resided, New Hope Living and Learning Center, was in danger of closing. They sought help from the Chicago Board of Education ("CBE") and the Illinois Department of Mental Health and Developmental Disabilities ("DMHDD") in finding an alternative placement for Lester.

In July, 1980, DMHDD placed Lester in Willowglen Academy, a residential treatment center in Milwaukee, Wisconsin. However, DMHDD did not pay for the cost of the ensuing treatment and special education that Lester received there. Eventually, Willowglen announced that it would discharge Lester on March 25, 1982 unless his outstanding bill was paid. In an effort to prevent the imminent discharge Lester and his parents filed this suit on February 18, 1982. On March 19, this court ruled that defendants, the various state and local officials responsible for providing Lester with an education under state and federal law, had apparently breached their duty to provide Lester with a free appropriate public education, and issued a preliminary injunction requiring them to assure Willowglen that they would pay Lester's outstanding bill, so that it would not discharge him. *See Parks v. Pavkovic,* 536 F.Supp. 296 (N.D.Ill.1982).[1]

Pending before the court are plaintiffs' motions for class certification and partial summary judgment.

THE MERITS

Before turning to the specific issues pending before the court, an examination of the merits of this lawsuit is necessary. The merits of the case provide the necessary per-

[1] In our earlier opinion, we stated many of the facts and legal principles applicable to the pending motions. We will not repeat them here, but merely refer to the prior opinion where necessary.

spective from which the more specific issues raised can be viewed.

"It is the purpose of this Act to assure that all handicapped children have available to them, within the periods specified . . . a free appropriate public education." So goes the preamble to the Education for All Handicapped Children Act of 1975 ("EHA"), 20 U.S.C. § 1400(c) (Supp. V 1981). The Act goes on to provide that participating states such as Illinois must provide a free appropriate public education to all handicapped children ages three to eighteen by September 1, 1978, and to all children ages three to twenty-one by September 1, 1980. *Id.* § 1412(2)(B) (1976). Local educational agencies in participating states are also required to provide a free appropriate public education. *Id.* § 1414(a)(1)(C)(ii).[2]

The free appropriate public education guaranteed by the act includes both special education and related services provided at public expense. *See* 20 U.S.C. § 1401(18) (1976). "Related services" include all supportive services necessary to enable a handicapped child to benefit from special education. *Id.* § 1401(17). "Related services," if they include placement in a residential facility, must be free of charge.

> If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

34 C.F.R. § 300.302 (1981).[3]

Thus, the EHA unambiguously requires Illinois to provide an appropriate public education at no cost to the

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[2] *See generally* 34 C.F.R § 300.300 (1981).

[3] None of the defendants challenge the validity of this or any other regulation of the United States Department of Education construing the EHA's requirements.

parents of handicapped children.[4] For reasons that escape us, however, Illinois chooses not to comply with this clear federal mandate. The Illinois Mental Health and Developmental Disabilities Code provides,

> Each recipient of services of the Department, and the estate of such recipient, is liable for the payment of sums representing charges for services to such recipient at a rate to be determined by the Department in accordance with this Act. If such recipient is unable to pay or if the estate of such recipient is insufficient, the responsible relatives are severally liable for the payment of such sums, or for the balance due in case less than the amount prescribed under this Act has been paid. The maximum services charged for each patient assessed against responsible relatives collectively may not exceed financial liability determined from income in accordance with the uniform schedule in Section 5-116 of this Act.

Ill.Rev.Stat. ch. 91½, § 5-105 (1981). The Act goes on to authorize DMHDD to assess the responsible relative liability created by the act to the responsible relatives, and creates a schedule for the assessment of costs based on

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[4] In addition to those authorities cited in our earlier opinion, *see Rabinowitz v. New Jersey State Bd. of Educ.*, 550 F.Supp. 481 (D.N.J.1982); *Davis v. Maine Endwell Central School Dist.*, 542 F.Supp. 1257, 1258 (N.D.N.Y.1982); *Gary B. v. Cronin*, 542 F.Supp. 102, 109 (N.D.Ill.1980); *William S. v. Gill*, 536 F.Supp. 505, 510 (N.D.Ill.1982); *Parks v. Illinois Dep't of Mental Health & Dev. Disab.*, 110 Ill.App.3d 184, 186-88, 65 Ill.Dec. 695, 697-98, 441 N.E.2d 1209, 1211-12 (1982). The Rehabilitation Act, 29 U.S.C. § 794 (1976), also guarantees the provision of a free appropriate public education to handicapped children. *See Parks*, 536 F.Supp. at 304 n. 16. In dicta, the Supreme Court has acknowledged that the EHA requires that states not charge for the provision of an appropriate education to handicapped children. *See Board of Educ. v. Rowley*, ___ U.S. ___, ___, 102 S.Ct. 3034, 3041, 73 L.Ed.2d 690 (1982) (the provision of a free appropriate public education requires that "instruction and services be provided at public expense").

the annual income of the recipient or his responsible relatives. *See id.* §§ 5-106 to 5-116.

Under this statutory scheme, DMHDD charges parents of handicapped children amounts equal to the responsible relative liability that they calculate for each recipient of services. In 1982, DMHDD made 207 assessments of responsible relative liability covering 478 recipients of services. Answers to Interrogatories by Defendant Pavkovic # 5. Lester's case is illustrative. His parents have been charged $100 per month since he was placed in Willowglen. This is despite the fact that Lester's father is unemployed. Plaintiffs have submitted affidavits from other parents of handicapped children who have had to pay similar charges. Thus, the free appropriate public education that is guaranteed by federal law is, in Illinois, anything but free.

CLASS CERTIFICATION

In challenging the assessment of a responsible relative liability,[5] plaintiffs seek to have this case certified as a class action on behalf of

> All handicapped Illinois children between the ages of three and twenty-one and their parents who have

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[5] In our earlier opinion, we acknowledged that the EHA requires plaintiffs to exhaust their administrative remedies before seeking judicial relief, but held that plaintiffs had adequately attempted to exhaust and that further resort to administrative remedies would be futile. In addition to the authority relied on in the earlier opinion, *see Vander Malle v. Ambach*, 673 F.2d 49, 52 (2d Cir. 1982); *Jose P. v. Ambach*, 669 F.2d 865, 869-70 (2d Cir.1982); *Gregg B. v. Board of Educ.*, 535 F.Supp. 1333, 1336-38 (E.D.N.Y.1982); *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F.Supp. 460, 463 (S.D.Tex.1982). Since then, ISBE has refused to decide plaintiffs' administrative appeal, though federal law requires it to decide the appeal within 30 days. 34 C.F.R. § 300.512(c) (1981). Thus, we continue to believe that plaintiffs have done everything possible to exhaust their administrative remedies, and that further resort to those remedies would be futile.

been refused full funding for private special education placements as a result of any of the following Illinois State Board of Education ("ISBE"), Illinois Department of Mental Health and Developmental Disabilities ("DMHDD"), Governor's Purchased Care Review Board ("GPCRB"), and Chicago Board of Education policies and practices:

a. DMHDD policy not to pay a portion of special education costs designated as "responsible relative liability;"

b. ISBE policy not to pay the DMHDD-designated responsible relative liability;

c. ISBE policy not to assure that other state agencies pay the DMHDD-designated responsible relative liability;

d. Chicago Board of Education practice not to pay the DMHDD-designated responsible relative liability for the children within its jurisdiction.

There are four prerequisites to class certification.

> (1) [T]he class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

This case satisfies the numerosity requirement. The parties appear to agree that the proposed class runs into the hundreds.

The case also satisfies the commonality requirement. The questions whether defendants fail to pay responsible relative liability and, if so, whether this violates federal law making judicial intervention appropriate are common to the class.

The typicality inquiry examines the relationship between the representative party's claims and the class' claims. Certification is appropriate unless the named plaintiffs present unique claims personal to them which are unlikely to be a major focus of litigation. *See Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir.1980), *cert. denied*, 451 U.S. 914, 101 S.Ct. 1988, 68 L.Ed.2d 304 (1981); *Koos v. First National Bank*, 496 F.2d 1162, 1164 (7th Cir.1974). Defendants launch a number of arguments entirely irrelevant to Lester's claim in an attempt to show it is not "typical."

First, defendants argue that Lester was not entitled to funding for his placement at Willowglen because his parents unilaterally placed him there. Plaintiffs allege to the contrary that DMHDD placed him there. Whichever is the truth is of little consequence, however. If DMHDD disagreed with Lester's parents' decision to send him to Willowglen, they could have refused to fund it, and insisted that he remain at New Hope pending administrative review. 20 U.S.C. § 1415(e)(2) (Supp. V 1981). Instead, DMHDD agreed to fund the placement at Willowglen, even before this suit was filed. The EHA will not countenance defendants' decision to accede to Lester's placement at Willowglen as long as they need not fully fund it. *See* 536 F.Supp. at 305. If DMHDD has initiated the administrative process for returning Lester to New Hope, this might be a different case.[6] However, that has not happened. It is little short of shameful for DMHDD to be content to leave Lester at Willowglen as long as it need not fully fund his placement.

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[6] Even then, however, the Act's status quo provision, requiring that handicapped children remain in their current placements pending administrative review of a proposed transfer, might require DMHDD to fund Willowglen pending a hearing. *See id.* Even when a child is in an unapproved placement, the EHA requires defendants to provide him with a free appropriate public education while they attempt to find him a suitable alternative placement. *See Vander Malle v. Ambach*, 673 F.2d 49, 52-53 (2d Cir.1982).

Second, defendants argue that Lester's claim is barred by res judicata. Lester successfully challenged DMHDD's imposition of a responsible relative liability during the period he was at New Hope in Illinois state court. *See Parks v. Illinois Department of Mental Health and Developmental Disabilities*, 110 Ill.App.3d 184, 65 Ill.Dec. 695, 441 N.E.2d 1209 (1982), from which leave to appeal was denied by the Illinois Supreme Court. However, defendants have never pleaded this defense as required by Fed.R.Civ.P. 8(c). Moreover, that judgment hardly precludes this action. The state court action was under the Illinois Administrative Review Act. As a result, the only relief plaintiffs could obtain was a reversal of the decision to impose a responsible relative liability for the placement at New Hope. The state court could not have provided prospective injunctive relief, or struck down the imposition of the liability for the Willowglen placement, which occurred long after the state action had been brought. *See* Ill.Rev.Stat. ch. 110, ¶ 275 (1981). Thus, plaintiffs' claims for prospective relief and reimbursement for costs assessed at periods other than while Lester was at New Hope could not have been litigated in the state action, and cannot be barred here. Plaintiffs' victory in state court means they cannot also recover the New Hope charges here, but they can recover the Willowglen charges and obtain injunctive relief against future Willowglen charges. These claims are fully typical of those of absent class members. *See Tonya K. v. Chicago Board of Education*, 551 F.Supp. 1107, 1111 (N.D.Ill. 1982). Whatever funds plaintiffs recovered in state court that cannot be recovered here should be easily determinable and not a major focus of this litigation.[7]

[7] Defendants also claim Willowglen is not eligible for funding because it is not a state-approved institution, it did not submit the proper forms, CBE did not submit the proper forms and a variety of similar bureaucratic reasons, none of which involve any faults on the part of Lester or his parents. As long as Lester remains a handicapped child entitled to statutory protection, defen-

(Footnote continued on following page)

The final prerequisite to certification involves the adequacy of the named plaintiffs' representation. The named plaintiffs' attorney must be qualified to conduct the litigation, and the plaintiff must not have interests antagonistic to those of the class. *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir.1977). The named plaintiffs are represented by the venerable Edwin F. Mandel Clinic University of Chicago Law School which has an outstanding track record, and their attorney has pursued this and similar litigation in a loyal and competent manner. The named plaintiffs have no interests antagonistic to those of the class. They seek to realize the promise of a free appropriate public education, just as do all other class members.

Having satisfied the prerequisites, plaintiffs seek certification under Fed.R.Civ.P. 23(b)(2), which applies where defendants have acted on grounds generally applicable to the class making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole.

Defendants do not dispute that if plaintiffs prevail, final injunctive relief and corresponding declaratory relief would be appropriate. Their only argument is that the class definition is overbroad in that it overlaps with a class of emotionally disturbed children which obtained relief from Chief Judge McGarr of this court in *Gary B. v. Cronin*, 542 F.Supp. 102 (N.D.Ill.1980). However, defendants never explain why the alleged overlap means they have not acted on grounds generally applicable to the class. It appears that the responsible relative liability is imposed on all class members, whether or not they were also in the *Gary B.* class. Defendants never argue otherwise. Nor do

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[7] *continued*
dants are not permitted to leave Lester in an unfunded placement. While Willowglen, CBE or others may have made mistakes, "that circumstance does not permit the State to disclaim its statutory responsibilities," *Vander Malle v. Ambach*, 673 F.2d 49, 52 (2d Cir.1982).

they argue that *Gary B.* classmembers' claims are barred by res judicata or otherwise. They do argue that relief here would be "inconsistent" with the *Gary B.* decree but again do not explain how. In fact. *Gary B.* ordered defendants to provide certain "related services" free of charge, which is entirely consistent with the relief plaintiffs seek here.

The motion for class certification should be and hereby is granted.

PARTIAL SUMMARY JUDGMENT

In their motion for partial summary judgment, plaintiffs contend that DMHDD's assessment of a responsible relative liability violates federal law, and specifically the duty to provide a free appropriate public education.

The only defendant that even attempts to defend the responsible relative liability under the Illinois Mental Health and Developmental Disabilities Code is DMHDD.

First, DMHDD argues that it is not bound by the EHA. This argument is frivolous. The Act applies to all state agencies "involved in the education of handicapped children." 34 C.F.R. § 300.2(b) (1981). DMHDD surely is involved in the education of handicapped children; it pays for the education of Lester and hundreds of handicapped children like him each year. This argument was made by DMHDD and rejected by us in our earlier opinion, *see* 536 F.Supp. at 304, and by the Illinois Appellate Court in the New Hope case, *see* 110 Ill.App.3d at 188, 65 Ill. Dec. at 698, 441 N.E.2d at 1212.[8] It fares no better the third time around.

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[8] *See also Jose P. v. Ambach*, 669 F.2d 865, 870-71 (2d Cir.1982). The federal regulations construing the EHA explicitly state that the Act applies to "Departments of Mental Health." 34 C.F.R. § 300.2(b)(3) (1981).

Second, DMHDD argues that the EHA is unconstitutional because it conflicts with the fourteenth amendment.[9] DMHDD argues that due process requires it to place handicapped children in the least restrictive environment possible.[10] Imposing a responsible relative liability is necessary, DMHDD argues, to give parents an incentive not to seek overly restrictive care for their children. Accordingly, the Illinois statutory scheme is necessary to enable the state to fulfill its obligation under the fourteenth amendment.

This argument, too, is frivolous. Defendants nowhere explain why parents will always opt for the most restrictive placement. In fact, the amount of the responsible relative liability assessed hinges on the parents' income, not on the restrictiveness of the placement. Thus, the Illinois scheme does not create a financial incentive to avoid restrictive placements. Neither does the EHA create an incentive to seek restrictive placement. The cost to parents remains zero no matter where the child is placed. Moreover, the Act explicitly requires that placements be made in the least restrictive environment. *See Kruelle v. New Castle County School District*, 642 F.2d 687, 695 (3d Cir.1981); *Department of Education v. Katherine D.*, 531 F.Supp. 517, 525-27 (D.Haw.1982); *Kruelle v. Biggs*, 489 F.Supp. 169, 174 (D.Del. 1980), *aff'd sub nom. Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981); 20 U.S.C. § 1412(5) (1976).[11]

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[9] Were the question a close one, we would have to certify it to the Attorney General of the United States under 28 U.S.C. § 2403 (1976). However, it is not.

[10] It is far from clear that due process requires this. In its first encounter with this issue, the Supreme Court held only that due process prohibits restrictions on the freedom of the handicapped which are not reasonably related to their safety, training, or other legitimate non-punitive governmental interests. *See Youngberg v. Romeo*, ____ U.S. ____, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).

[11] *See also Board of Educ. v. Rowley*, ____ U.S. ____, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982).

In short, once it is established that the EHA is valid and applicable, there is little question but that Illinois has violated it. The class we have certified consists of handicapped children clearly entitled to an education at no cost to their parents under federal law. The Illinois statutory scheme by which a "responsible relative liability" is assessed for what no one disputes are special education and related services within the meaning of the EHA is in the conflict with federal law, and is invalid under the supremacy clause. The Illinois Appellate Court has already held the statutory scheme by which DMHDD imposes a responsible relative liability unconstitutional, relying in large part on our earlier opinion. *See Parks v. Illinois Department of Mental Health and Developmental Disabilities*, 110 Ill.App.3d 184, 65 Ill.Dec. 695, 441 N.E.2d 1209 (1872). We agree and hereby grant plaintiffs' motion for partial summary judgment.

WHO IS LIABLE?

Defendants devote most of their memoranda to the arguing about which of them should be held liable for the failure of Illinois to comply with federal law. DMHDD contends that the EHA places the responsibility for compliance on ISBE, and that since only ISBE receives federal funds under the EHA, only ISBE should be held liable. ISBE claims that since it is DMHDD that placed Lester and most other persons for whom a responsible relative liability is assessed, and since it is DMHDD that actually assesses the responsible relative liability, DMHDD alone should be held responsible. GPCRB claims that it is not responsible, since all it does is set rates at which providers of special education and related services are paid. CBE argues that there is nothing in the record showing that it has a policy of not paying the responsible relative liability, so no relief should be entered against it.

All this finger pointing makes for a somewhat sorry spectacle. One point remains clear, however: the imposi-

tion of a responsible relative liability is violative of plaintiffs' federal civil rights. From this fact follows a corollary: where there is a right, there is a remedy. Plaintiffs' civil rights cannot be permitted to slip between the cracks simply because the state of Illinois has apportioned liability in a way that does not focus blame on a single agency.

ISBE, as the state educational agency,[12] is clearly responsible for Illinois' failure to comply with federal law. Under the EHA, it is responsible for ensuring compliance with the requirements of the Act. *See* 20 U.S.C. § 1412(6) (1976); 34 C.F.R. § 300.600. The ultimate responsibility is placed on the ISBE precisely to avoid an abdication of responsibility by other state agencies such as has occurred here. *See id.* Comment.[13] ISBE may not rely on other agencies, alleged derelictions, for the ultimate responsibility for assuring compliance with the EHA lies with it and it alone. DMHDD's answers to interrogatories establish that hundreds of families of handicapped children have been assessed responsible relative liabilities for services covered by the Act. No contention is made the ISBE or any other state agency paid these assessments. Thus, the education these children have received was not "free," and as a result, ISBE has breached the affirmative obligation placed on it by federal law to ensure that Illinois provides a free appropriate public education to handicapped children.

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[12] ISBE clearly qualifies as the state educational agency. *See* 20 U.S.C. § 1401(7) (1976).

[13] The comment is instructive. Referring to the rule that that state agency must bear ultimate responsibility, it states, "Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped children, sources of funding, and type of services delivered. . . . [T]he responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency." *Id.* (quoting Sen.Rep. No. 168, 94th Cong., 1st Sess. 24 (1975), *reprinted in* 1975 U.S.Code Cong. & Ad.News 1425, 1448).

DMHDD is also liable. We have already held that the EHA applies to it. The fact that DMHDD receives no federal funds under the Act is no defense; 34 C.F.R. § 300.2 (b) (1981) explicitly states that the Act applies to DMHDD. The comment continues,

> The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

Id. Comment. If DMHDD requires financial assistance to meet its obligations from ISBE, which does receive federal funds, a cost sharing arrangement may be used. *See id.* § 300.301(a).[14]

GPCRB is also liable. Under state law, it must approve costs of and facilities for special education, and establish guidelines for coordination of financial assistance to assure that no handicapped child is denied the benefits of any state program. *See* Ill.Rev.Stat. ch. 122, ¶ 14-7.02 (1981). However, it remains bound by the provisions of the Mental Health and Developmental Disabilities Code providing for a responsible relative liability. *See id.* Thus, it too is involved in the education of handicapped children within

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[14] DMHDD and GPCRB rely on *Kruelle v. Biggs*, 489 F.Supp. 167, 174 (D.Del.1980), *aff'd sub nom. Kruelle v. New Castle County School Dist.*, 642 F.2d 687 (3d Cir.1981) in support of their contention that only ISBE is liable. There, the court imposed liability on the state educational agency. However, the court nowhere stated that other state agencies involved in the education of handicapped children were not liable. All it did was place ultimate responsibility for compliance with federal law on the state educational agency, as the appellate opinion in the case made clear. *See* 642 F.2d at 696-97. The same may be said of defendants' reliance on *North v. District of Columbia Bd. of Educ.*, 471 F.Supp. 136, 139-40 (D.D.C.1979). In any event, these defendants do not attack the validity of 34 C.F.R. § 300.2(b) (1981), which explicitly applies the EHA to them.

the meaning of 34 C.F.R. § 300.2(b) (1981) and is part of the structure by which a responsible relative liability is assessed.

CBE, in its answer to the amended complaint, denies the existence of a policy of not paying the responsible relative liability assessed by DMHDD. However, it carefully refrains from affirmatively stating that it does pay the assessments. Nor does it submit affidavits or other evidentiary materials in support of its denial.

In Lester's case, CBE did refuse to pay the assessment. Administrative Record 514. CBE concedes as much. Yet, presumably the CBE hearing officer's ruling was not an arbitrary or freakish happenstance, but the product of some policy or practice. At least we think the facts of Lester's case raise an inference that CBE does not customarily pay the liability.[15]

Moreover, CBE takes the position that it is "precluded" from making any payments for the education of handicapped children which are not authorized by Ill.Rev.Stat. ch. 122, ¶ 14-7.02 (1981). *See* Certain Defendant's Responses to Plaintiff's Motion for Partial Summary Judgment at 2. Yet, the final paragraph of that statute incorporates the provisions of the Mental Health and Developmental Disabilities Code which state that the responsible relatives are liable for a portion of costs. Thus, by CBE's own reasoning, it is precluded from paying DMHDD-assessed responsible relative liabilities. In fact, we have examined the entire School Code in an attempt to find some statutory authority for CBE to pay responsible relative liabilities, and have found none. It appears that Illinois law does not permit CBE to pay these costs.[16]

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[15] Moreover, DMHDD's answers to interrogatories state that a responsible relative liability is assessed and placements are not fully funded even where the child receives "LEA" (local educational agency) funds.

[16] Thus, even if CBE wishes to pay the assessments, it may require the aid of a federal injunction to secure it against the risk that its payments are not proper under state law.

In light of the preceding, and CBE's failure to submit any evidentiary material indicating that it pays the DMHDD assessments, we think that a fair inference has been raised that CBE does not pay the assessments which has not been rebutted by specific facts supported by affidavit or otherwise as required by Fed.R.Civ.P. 56(e). Plaintiffs are entitled to partial summary judgment against CBE.[17]

In sum, all the defendants are obliged to provide plaintiffs with a free appropriate public education. That duty has been breached, and all are liabile. We need not, at this juncture, sort out exactly which agency or agencies will pay the assessments or how this will be done.[18] It is enough that we assign to ISBE the ultimate responsibility for coordinating compliance with federal law in the final decree that we issue, as the Third Circuit has recognized.

> By placing the burden for coordinating efforts and financial arrangements for [plaintiffs'] education on

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[17] We are disturbed that CBE has denied the existence of a policy of not paying the assessments, yet failed to affirmatively state that it does not pay the assessments and submit affidavits in support of the claim. If CBE actually does pay the assessments, it should be easy for it to obtain affidavits to that effect. If it does, we will gladly reconsider our ruling. However, we are disinclined to force plaintiffs to trial unless and until CBE does make an affirmative statement of its policy, supported in the manner required by rule 56.

[18] *Cf. United States v. Board of School Commissioners*, 677 F.2d 1185, 1194 (7th Cir.) (Posner, J., dissenting) ("[R]ather than get into the tangled and recriminatory business of who shall pay for this court-ordered busing, we should say: 'This litigation ended, at long last, when the district court's busing order was upheld . . . . Let the State of Indiana worry about who shall bear the costs of complying with the order. It is not a matter for the federal courts unless the state should devise a method of financing that discriminates against black people who are the intended beneficiaries of the order. Other than in a purely technical sense there is no federal question before us today.' "), *cert. denied*, ____ U.S. ____, 103 S.Ct. 568, 74 L.Ed.2d 931 (1982).

> the State Board of Education, the trial judge was both reflecting legislative intent and appropriately observing the limits of his institutional role. Rather than rigidly prescribe for the state how various local and state agencies should contribute to the provision of a free education for [plaintiffs], the federal court left such interactions to the discretion of the state officials involved.

Kruelle v. New Castle County School District, 642 F.2d 687, 697 (3d Cir.1981).

All defendants are liable and will be bound by our final decree. We will dictate no specific mode of compliance to them, but merely order ISBE to assume ultimate responsibility for developing a plan that complies with federal law.

APPROPRIATE RELIEF

There is no dispute that if defendants are liable, final injunctive relief against the assessment of a responsible relative liability would be appropriate.

In our earlier opinion, we concluded that plaintiffs may also obtain reimbursement of past charges assessed against them, since the EHA abrogates defendants' eleventh amendment immunity. *See* 536 F.Supp. at 306-11. *Accord, Department of Education v. Katherine D.*, 531 F.Supp. 517, 528-31 (D.Haw.1982). *Contra, Matthews v. Ambach*, 552 F.Supp. 1273, 1280-81 (W.D.N.Y.1982).

In their motion to reconsider the granting of a preliminary injunction, the state defendants argued that *Board of Education v. Rowley*, ____ U.S. ____, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) is to the contrary. They relied on dicta in the case, specifically two footnotes, *id.* at 3042 n. 11, 3049 n. 26. In those footnotes the Court rejects a claim that the EHA can be read to impose a duty on the states to maximize the educational potential of handicapped children because Congress, "when exercising its spending power," can impose no burden on the states

unless it does not unambiguously. Defendants contend that this demonstrates that the Act was passed pursuant to Congress' article I spending power, rather than its power to enforce the fourteenth amendment. A finding that the Act was passed pursuant to U.S. Const. amend. XIV, § 5 was a necessary predicate to our conclusion that the Act abrogates the states' eleventh amendment immunity from suits for damages. *See* 536 F.Supp. at 306-07.

In making this argument, state defendants[19] overlook the context of the footnotes on which they rely. These footnotes respond to a claim that the Act requires that each handicapped child's educational potential be maximized. The Court noted that such a claim could not be based on the fourteenth amendment, since the cases construing that constitutional provision on which Congress relied in writing the Act had not recognized a right to "maximized" potential. *See* 102 S.Ct. at 3043-44 & n. 15, 3047-48. Thus, to the extent that Ms. Rowley sought to go further and assert such a right, it could only be based on the spending power. That is why the Court referred to her claim as based on an article I power. However, when the Court referred to the core right to a free appropriate public education, it did recognize that that statutory right had its genesis in the congressional power to enforce the fourteenth amendment. The Court recognized that the cases which established a fourteenth amendment right to education on behalf of handicapped children and "the principles that they established are the principles which, to a significant extent, guided the drafters of the Act." *Id.* at 3044. The Court acknowledged that the Act was designed to effectuate the principles of these constitutionally-based cases. *See id.* at 3043-44 & n. 18. The Court went on to observe, "Respondents and the United States correctly note that Congress sought 'to provide

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[19] CBE, through defendant Love, does not make this argument, presumably because it does not enjoy an eleventh amendment immunity under any circumstances. *See* 536 F.Supp. at 306 n. 18.

assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States *to provide equal protection of the laws.*' " *Id.* at 3046-47 (emphasis supplied) (quoting Sen.Rep. No. 168, 94th Cong., 1st Sess. 13 (1975), *reprinted in* 1975 U.S.Code Cong. & Ad.News 1425, 1437[20]). The Court characterized the Act as a "legislative conception of the requirements of equal protection," *id.* at 3047, designed "to provide a 'basic floor of opportunity' consistent with equal protection," *id.* The Court concluded that the Act and its history reflects Congress' belief that equal protection required that handicapped children receive meaningful access to a free appropriate public education, though no more. *Id.* at 3047-48. *See also id.* at 3053 (Blackmun, J., concurring in the judgment).

Here, plaintiffs do not seek to have the educational potential of handicapped children "maximized," but only to obtain access to the "free" education guaranteed by the Act. Thus, what plaintiffs seek is not the sort of claim that can only be based on the spending power, but rather is the "free" education which *Rowley* acknowledges is itself a "legislative conception of the requirements of equal protection." As such, plaintiffs' claims arise from Congress' efforts to enforce the fourteenth amendment. *Rowley* confirms our view that the Act was passed pursuant to the congressional power to enforce the fourteenth amendment.

As we noted in our earlier opinion, the EHA requires that we award plaintiffs "all appropriate relief." *See* 536 F.Supp. at 311. We concluded that an order requiring defendants to pay costs previously assessed would constitute appropriate relief. *See id.* at 312-13. We see no reason to depart from that conclusion. Plaintiffs do not seek unliquidated sums as "tort damages" caused by defendants'

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[20] We also cited this passage from the Senate Report in our earlier opinion. *See* 536 F.Supp. at 308.

conduct.[21] Rather, all they seek is the amounts assessed against them as responsible relative liabilities. Unless defendants reimburse them for these amounts, there is no way plaintiffs' right to a free appropriate public education can ever be vindicated. We conclude that an order requiring defendants to reimburse plaintiffs for costs they have incurred since February 18, 1977 would constitute appropriate relief in this case.[22]

CONCLUSION

To summarize, plaintiffs' motions for class certification and partial summary judgment are granted. Defendants' policies of leaving unpaid responsible relative liability assessments violates federal law. Defendants will be permanently enjoined from leaving these assessments unpaid in the future. Defendants will also be permanently enjoined to calculate and pay to each family in the plaintiff class, or, where the family has not paid the assessment, to the provider who has been left unpaid, all responsible

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[21] If they did, this would be a different case. Tort damages can never be appropriate relief. *See Anderson v. Thompson*, 658 F.2d 1205, 1213 & n. 12 (7th Cir.1981); *William S. v. Gill*, 536 F.Supp. 505, 512 (N.D.Ill.1982); *Gregg B. v. Board of Educ.*, 535 F.Supp. 1333, 1339 (E.D.N.Y.1982); *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F.Supp. 460, 465 (S.D.Tex. 1982).

[22] The parties appear to agree that February 18, 1977 is an appropriate date to use as the starting date for a reimbursement order. In addition to those authorities contained in our earlier opinion which support entry of a reimbursement order, *see Matthews v. Ambach*, 552 F.Supp. 1273 (W.D.N.Y.1982); *Calhoun v. Illinois State Bd. of Educ.*, 550 F.Supp. 796, 803 (N.D.Ill. 1982); *William S. v. Gill*, 536 F.Supp. 505, 511-12 (N.D.Ill.1982); *Gregg B. v. Board of Educ.*, 535 F.Supp. 1333, 1338-39 (E.D.N.Y.1982); *Department of Educ. v. Katherine D.*, 531 F.Supp. 517, 528-31 (D.Haw.1982). However, children ages 3-5 and 18-21 should only receive relief for costs incurred during periods when children of these ages were guaranteed a free education under state law. *See* 20 U.S.C. § 1412(2)(B) (Supp. V 1981).

relative liability amounts charged since February 18, 1977. Plaintiffs are to submit a draft decree on notice to defendants.[23]

[23] As we stated earlier, the draft decree should apply to all defendants, but should place on ISBE the ultimate responsibility for devising a mechanism to coordinate compliance with the decree. However, the decree should do no more than order defendants to pay the responsible relative liability. The specific method by which payments are made should be left to defendants' discretion, at least in the first instance.

At the time we enter the permanent injunction, we will address the question whether the judgment we enter should be made final under Fed.R.Civ.P 54(b).

APPENDIX C

110 Ill.App.3d 184
65 Ill.Dec. 695

Richard PARKS, Marilyn Parks and Lester Parks by his next best friend Richard Parks, Plaintiffs-Appellees,

v.

ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES, Defendant-Appellant.

No. 81-3084.

Appellate Court of Illinois,
First District, First Division.
Oct. 18, 1982.

Parents of handicapped child appealed from order of the Department of Mental Health and Developmental Disabilities which assessed a responsible relative liability charge against them for the residential placement of their handicapped child. The Circuit Court, Marjan P. Staniec, J., reversed the Department, and the Department appealed. The Appellate Court, Goldberg, J., held that: (1) federal Education for All Handicapped Children Act precluded state from assessing responsible relative liability charges; (2) the Department, not only the State Board of Education was bound by the federal law; and (3) State Board of Education was not a necessary party.

Affirmed.

* * *

GOLDBERG, Justice:

Richard and Marilyn Parks, parents, and Lester Parks, their son, by his next friend, Richard Parks (plaintiffs), filed this action seeking judicial review of an administrative decision rendered by the Illinois Department of Mental Health (defendant). (Ill.Rev.Stat.1981, ch. 110, par. 264

et seq.) Defendant had ruled that the assessment of a responsible relative liability charge against plaintiffs for the care of Lester Parks, a handicapped child diagnosed as autistic, was mandated by section 5-105 of the Mental Health and Developmental Disabilities Code (Ill.Rev.Stat. 1979, ch. 91½, par. 1-100 *et seq.*) hereinafter Code. The trial court found this decision was in violation of the Education for All Handicapped Children Act of 1975 (20 U.S.C. §§ 1401 *et seq.* (1976)) hereinafter EAHC. Defendant appeals.

The facts are not in dispute. Plaintiff Lester Parks, now approximately 17 years old, is a multihandicapped child. In 1975 it was determined he required residential placement. On February 16, 1976, defendant placed Lester at the New Hope Living and Learning Center in Waterloo, Illinois. The propriety of this placement is not questioned.

On August 1, 1979, defendant notified Richard and Marilyn Parks that, effective July 1, 1979, a responsible relative liability charge of $100 per month would be assessed against them. (Ill.Rev.Stat.1979, ch. 91½, par. 5-105.) Plaintiffs appealed from this assessment. After a hearing, the assessment was affirmed. On further appeal to the State of Illinois Board of Reimbursement Appeals, the assessment was again affirmed.

On administrative review, the trial court ruled the assessment of liability against the parents of a handicapped child for the cost of a residential placement that is necessary to meet the child's educational needs is a violation of section 612 of the EAHC (20 U.S.C. § 1412 (1976)) and regulations thereunder (45 C.F.R. § 121a.2, § 121a.301(a) and § 121a.302 (1980)). The trial court ruled the State must pay for all placements educationally necessary and must bear all costs incurred therein under the above cited authorities. The trial court further ruled, since defendant must bear these costs, it was unnecessary to remand the case for a determination of which costs of the placement are "educational."

In this court, defendant contends it is not precluded from charging parents of a handicapped child a responsi-

ble relative liability pursuant to section 5-105 of the Code (Ill.Rev.Stat.1979, ch. 91½, par. 5-105). Defendant also contends the trial court went beyond the scope of judicial review when it found all costs associated with the child were for educational purposes.

In our opinion, the ruling by the trial court is completely supported by Federal law. It is undisputed Lester Parks is a handicapped child and Federal law requires maintenance by the State of "a policy that assures all handicapped children the right to a free appropriate public education" (20 U.S.C. § 1412(1) (1976)). Such education is to include both "special education" and "related services" (20 U.S.C. § 1401(18) (1976)). The EAHC defines "special education" to be (20 U.S.C. § 1401(16) (1976)):

> "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions."

The EAHC defines "related services" to include (20 U.S.C. § 1401(17) (1976)):

> "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

With respect to residential placement of a handicapped child, the regulations promulated to enforce the EAHC provide (45 C.F.R. § 121a.302 (1980)):

> "If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including nonmedical care and room and board, must be at no cost to the parents of the child.

> "*Comment.* This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind."

Defendant contends these statutes and regulations should not prevent the State of Illinois from assessing responsible relative liability charges pursuant to section 5-105 of the Code (Ill.Rev.Stat.1979, ch. 91½, par. 5-105). We disagree. In our opinion, the regulations cited above unequivocally establish residential placement for the purpose of special education and also all related services are to be provided free from cost to the parents. The above excerpts from the Code and the regulations illustrate graphically the strong insistence by Federal law in the requirement that all expenditures of every kind for the education and welfare of the child are to be borne not by the parents but by the educational authorities of the State.

Under the doctrine of preemption as derived from the United States Constitution (U.S. Const., art. VI, § 2), a state law in conflict with Federal statutes and regulations "is nullified to the extent that it actually conflicts with [F]ederal law." (*Fidelity Federal Savings & Loan Association v. de la Cuesta* (1928), ____ U.S. ____, ____, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664. See also *Olsen v. Financial Federal Savings & Loan Association* (1982), 105 Ill. App.3d 364, 366-67, 61 Ill.Dec. 253, 434 N.E.2d 406, and cases there cited). Thus, the imposition of the responsible relative liability charge by defendant cannot stand in view of the express language of the Federal statutes and regulations.

Our view is supported by the recent ruling in *Parks v. Pavkovic* (N.D.Ill.1982), 536 F.Supp. 296. In *Parks*, the same plaintiffs as in the instant case filed suit to enjoin the instant defendant and other State agencies from discharging plaintiff Lester Parks from a residential facility because of the failure of his parents to pay the responsible relative liability charges for 1980 and 1981. In grant-

ing the plaintiffs' request for a preliminary injunction, the district court addressed the question of whether these costs may be imposed upon the plaintiffs. The court stated (536 F.Supp. 296, 304):

> "There is no dispute that the outstanding bill for services provided to Lester * * * involves the provision of special education and related services. There is also no dispute that placement * * * was necessary * * * in order to provide Lester with special education and related services. This being the case, the unambiguous mandate of [F]ederal law is that these services be provided at no cost to Lester's parents. While defendants' refusal to meet fully Lester's expenses may be authorized by state law, such laws are inconsistent with the mandate to provide an appropriate free public education, and cannot stand. [Citations.]"

In adopting the reasoning of the district court, we are mindful the analysis was limited to the probability of the plaintiffs' eventual success on the merits and therefore does not have the *res judicata* effect of a final order. However, the reasoning and the authorities cited therein are so persuasive we find no difficulty in relying upon the pertinent and well stated opinion of the district court. *Parks*, 536 F.Supp. 296, 304-05.

Defendant contends it does not have the authority to provide the relief sought by plaintiffs. Defendant argues only the Illinois State Board of Education (ISBE) is authorized to educate handicapped children. Defendant refers to 20 U.S.C. § 1412(6) (1976), which states the requirements of the Act are to be administered by the "[S]tate educational agency." Therefore, urges defendant, plaintiffs must obtain their relief exclusively from the ISBE.

We cannot agree. The regulations state the EAHC extends (34 C.F.R. § 300.2(b) (1981)):

> "to *all* political subdivisions of the State that are involved in the education of handicapped children. These would include:

> "(1) The State educational agency,
>
> "(2) local educational agencies and intermediate educational units,
>
> "(3) other State agencies and schools (*such as Departments Mental Health and Welfare* and State schools for the deaf or blind), and
>
> "(4) State correctional facilities." (Emphasis added.)

We believe it cannot be seriously asserted defendant is not "involved in the education of handicapped children" in view of the facts of this case and the *Parks* decision in the district court. We are therefore impelled to conclude the EAHC is binding on defendant as it is upon all other educational agencies of Illinois. In *Parks*, 536 F.Supp. 296, 304, the court held:

> "Under the EHA, while the ultimate responsibility for assuring compliance with [F]ederal law rests with ISBE, see 34 C.F.R. § 300.600 (1981), the Act's requirements also apply to all other state and local departments involved with the education of handicapped children. [34 C.F.R. § 300.2(b) (1981).]"

The original brief filed by defendant stated that the hearing officer pointed out that the ISBE is responsible for the administration of EAHC. The brief then quoted from the EAHC to the effect that the ISBE was responsible for carrying out the Federal programs. (20 U.S.C. § 1412 (1976).) However, defendant's reply brief contains an elaborate argument to the effect that the ISBE is a necessary party to these proceedings. We reject this contention.

The original brief did not pursue and advance this theory with citation of authorities. Therefore, it has been waived. (*Saldana v. Wirtz Cartage Co.* (1978), 74 Ill.2d 379, 386, 24 Ill.Dec. 523, 385 N.E.2d 664.) The applicable rules provide that the reply brief is to be "confined strictly to replying to arguments presented in the brief of the appellee * * *." (73 Ill.2d R. 341(g).) We conclude that the matter has been waived and was improperly raised

in defendant's reply brief. *Department of Transportation v. Drobnick* (1977), 54 Ill.App.3d 987, 993, 12 Ill.Dec. 619, 370 N.E.2d 242, *leave to appeal denied*, 71 Ill.2d 597.

In addition, on the merits of the situation, plaintiffs did not commence this litigation. The defendant made demand upon plaintiffs for payment of money and brought plaintiffs into a proceeding conducted by defendant in an effort to collect certain assessments. Plaintiffs were then obliged to proceed with administrative review. The necessary party argument has no place in this record.

We believe our ruling here to be in accordance with our decision in *In the Matter of the Special Education Placement of Steven Walker* (1982), 107 Ill.App.3d 1053, 63 Ill. Dec. 651, 438 N.E.2d 582. There, a disagreement arose between the parent of a handicapped child and the local school district concerning the educational placement of the child. While awaiting a hearing on this issue, the parent place the child in a private special educational facility. A subsequent hearing which resulted in a recommendation of residential placement was overruled by the Illinois Office of Education (IOE). The parent brought an action in administrative review. The trial court reversed the administrative decision and found the IOE liable for payment of all costs of the child's placement. On appeal, we affirmed. We specifically rejected the IOE's contention that Steven Walker received "only mainstream instruction" and not "special education" and "related services" at the institution. Based on the record before us, we concluded the services provided Steven Walker fell into the categories of "special education" and "related services" and must therefore be provided for him at no cost to his family. 107 Ill.App.3d 1053, 1060-61, 63 Ill.Dec. 651, 438 N.E.2d 582.

Defendant's second and final contention is that the trial court went beyond the scope of administrative review in its holdings. Defendant urges the court found all costs of Lester Parks' care were related to his education whereas no evidence as to this point was heard before the administrative body. Therefore, defendant requests the case be

remanded to a hearing officer so this question may be properly determined.

We do not agree. The trial court below did not find as a factual issue all costs for Lester Parks' care were related to his education. Rather, the trial court concluded as a matter of law that where residential placement was necessary for the education of the handicapped child, it was a violation of Federal law as set forth in EAHC and of its attendant regulations to assess the responsible relative liability charge against the parents. The trial court further held Federal law required defendant to pay the costs of "all placements that are educationally necessary, not only those placements that are 'solely for educational purposes.' " The trial court also found defendant erred as a matter of law in finding only the ISBE to be bound by the Federal statutes and regulations. These rulings by the trial court are all legal matters upon which the trial court properly ruled. Actually the only question of fact before the trial court was the propriety of Lester Parks' residential placement, which was never questioned by either party. This situation contrasts with the *Steven Walker* case where the type of educational services provided was an issue. Therefore, in the instant case, the trial court did not exceed its scope of review. Actually the trial court determined only issues of law in complete accordance with the pertinent statute (Ill.Rev.Stat.1981, ch. 110, par. 274), and with the decided cases. *Caterpillar Tractor Co. v. Department of Revenue* (1963), 29 Ill.2d 564, 566, 194 N.E.2d 257, as cited in *Cook County Masonic Temple Association v. Department of Revenue* (1982), 104 Ill.App.3d 658, 660, 60 Ill.Dec. 341, 432 N.E.2d 1240.

The judgment appealed from is accordingly affirmed.

Judgment affirmed.

CAMPBELL, P.J., and McGLOON, J., concur.

APPENDIX D

U.S. Const., art. VI, § 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

20 U.S.C. § 1400, 84 Stat. 175

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Education of the Handicapped Act".

(b) Findings

The Congress finds that—

(1) there are more than eight million handicapped children in the United States today;

(2) the special education needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from hav-

ing a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

(Pub.L. 91-230, Title VI, § 601, Apr. 13, 1970, 84 Stat. 175, amended Pub.L. 94-142, § 3(a), Nov. 29, 1975, 89 Stat. 774).

20 U.S.C. § 1401, 97 Stat. 1357, 1358

§ 1401. Definitions

As used in this chapter:

(a) As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) Repealed. Pub.L. 98-199, § 2(2), Dec. 2, 1983, 97 Stat. 1357.

(3) The term "Advisory Committee" means the National Advisory Committee on the Education of Handicapped Children.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter, or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public body of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which—

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

EDITOR'S NOTE

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(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Secretary pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however,* That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Secretary determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, he shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine which particular institutions meet such standards. For the purposes of this paragraph the Secretary shall publish a list of nationally recognized accrediting agencies or associations which he deter-

mines to be reliable authority as to the quality of education or training offered.

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems, which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive

services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, wherever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expen-

diture in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

(b) For purposes of subchapter III of this chapter, "handicapped youth" means any handicapped child (as defined in subsection (a)(1) of this section) who—

(1) is twelve years of age or older; or

(2) is enrolled in the seventh or higher grade in school.

(As amended Pub.L. 98-199, §§ 2, 3(b), Dec. 2, 1983, 97 Stat. 1357, 1358.)

20 U.S.C. § 1412

Eligibility requirements

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 613(b) in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that --

. . .

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three

and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

. . .

20 U.S.C. § 1415

Procedural safeguards

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection

(c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

34 C.F.R. § 300.2

Applicability to State, local and private agencies.

(a) States. This part applies to each State which receives payments

under Part B of the Education of the Handicapped Act.

(b) Public agencies within the State. The annual program plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include:

(1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) Private schools and facilities. Each public agency in State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B)

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

34 C.F.R. §300.302

Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B)

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

34 C.F.R. § 300.401

Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§300.340-300.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school of facility which meets the standards that apply

to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD PARKS, MARILYN PARKS, and LESTER PARKS, by his parents and next friends, RICHARD PARKS and MARILYN PARKS, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.) No. 82 C 96

IVAN PAVKOVIC, Director, Department of Mental Health and Developmental Disabilities, EDWARD COPELAND, Chairman, Illinois State Board of Education, RUTH LOVE, Superintendent, Chicago Public Schools, PATRICIA BARGER, Representative, Department of Mental Health and Developmental Disabilities, ROBERT MANDEVILLE, Director, Bureau of the Budget, WILLIAM KEMPINERS, Director, Department of Public Health, JEFFREY MILLER, Director, Department of Public Aid, GREGORY COLER, Director, Department of Children and Family Services, ROBERT GRANZEIER, Acting Director, Department of Vocational Rehabilitation, DONALD GILL, State Superintendent of Education, individually and in their official capacities,

Defendants.

MEMORANDUM OPINION

Prentice H. Marshall, District Judge

Plaintiffs in this action are Lester Parks and his parents and next friends, Richard and Marilyn Parks.[1/] Lester is currently 17 years old, and has autistic characteristics, moderate mental retardation, severe emotional disturbances, speech and language impairments, and behavioral disorders. Because of these handicaps, Lester qualifies as a handicapped child entitled to the protections of the Education for All Handicapped Children Act of 1975, 20 U.S.C. § §1401-61 (1976), see id. § 1401(1) ("The term 'handicapped children' means mentally retarded, . . . spech impaired, . . . seriously emotionally disturbed [children] . . . who by reason thereof require special education and related services."), and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. II 1978), see id. § 706(7)(B) ("[T]he term 'handicapped individual

means . . . any person who (i) has a physical or mental impairment which substantially limits one of more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."). Lester is in need of special education and related services in a residential facility due to the severity of his handicaps. In early 1980, Lester resided in a facility called the New Hope Living and Learning Center, which provided Lester with educational and other services enabling him to receive an education which he would not have been able to receive in a nonresidential public school. At the time, however, Lester's parents feared that New Hope was in danger of closing.[2/] As a result, they requested help from the Chicago Board of Education ("CBE") in locating and placing Lester in a new facility suitable for his educational

needs. CBE never did find an appropriate placement for Lester.

At some point, it appears that someone requested that the Illinois Department of Mental Health and Developmental Disabilities ("DMHDD") also locate and place Lester in a suitable facility, for in July, 1980, DMHDD Placed Lester in Willowglen Academy, a residential treatment facility in Milwaukee, Wisconsin. Lester has remained at Willowglen ever since. Plaintiffs do not challenge DMHDD's placement of Lester; to the contrary, they appear to be satisfied with the education Lester is receiving at Willowglen. What they do challenge, however, is the failure of various state agencies and CBE to assume the full cost of Lester's placement at Willowglen.[3/] Plaintiffs allege that Lester has a right, under the Education for All Handicapped Children Act ("EHA") and §504 of the Rehabilitation Act[4/]

to a free appropriate public education, and that this right has been denied by defendants' refusal to assume all the costs associated with Lester's education. The specific allegations, as yet undenied by defendants, are that: (1) DMHDD refuses to assume $100 per month of the costs of Lester's placement at Willowglen, denominating that amount "responsible relative liability." Thus, for every month since July, 1980, the "Individual Care Grant" Lester receives from DMHDD has been reduced by $100. (2) DMHDD has reduced its funding of Lester's placement further by refusing to pay for amounts it claims are attributable to "clothing and allowance." DMHDD refused to pay $17.24 per month for this reason from July, 1980 from December, 1980, and has refused to pay $1.42 per day from January 1, 1981 through December 31, 1981 on the ground that this amount was attribut-

able to "clothing, medical supplies and purchased services."[5/] (3) DMHDD has not yet approved a 1982 rate for Lester's expenses at Willowglen, and is paying those expenses at a lower, 1981 rate.[6/] (4) DMHDD has refused to pay Lester's speech therapy costs, payable to "Bell Therapy," incurred prior to August 17, 1981. (5) DMHDD, CBE and the Illinois State Board of Education ("ISBE") have refused to pay Lester's special education and related services expenses for periods prior to the time Lester and Willowglen were approved for funding. Willowglen was not approved until September, 1981, and Lester was not approved until January 22, 1982. There is some dispute as to why this delay occurred. The state defendants blame Willowglen for its failure to obtain earlier approval. As to the failure to approve Lester for funding prior to January 22, 1982, there is no

explanation in the record. Whatever the reasons, there is no allegation that Lester is at fault for either delay. (6) ISBE, and apparently DMHDD and CBE as well, have refused to pay for Lester's tuition at rates in excess of the rate approved for Willowglen by the Governor's Purchases Care Review Board ("GPCRB"). GPCRB is responsible under state law for ensuring that the state meets its obligations to provide handicapped students with an appropriate education by promulgating appropriate guidelines and standards. See Ill. Rev. Stat., ch. 122, § 14-7.02 (1979). The current GPCRB-approved rate does not meet Lester's actual expenses at Willowglen.

Sometime in 1981, Lester's parents requested a due process hearing from CBE at which they would be able to air their complaints about CBE's alleged failure to provide Lester with an appro-

priate free education. There is some dispute as to exactly when the hearing was requested. What is agreed is that a hearing was held on December 1, 1981, and a decision rendered on December 8, 1981. The hearing officer decided that CBE had breached its duty to provide Lester with an appropriate free public education, and required CBE to assume Lester's costs in the future.[7/] However, the officer declined to order CBE to assume responsibility for costs assessed to Lester's parents in the past; the decison has prospective force only. Plaintiffs appealed the officer's decision on January 5, 1982. Apparently because of a delay caused by CBE,[8/] the case has not been decided yet by ISBE, despite the fact that federal law requires ISBE to reach a final decision within 30 days of receipt of plaintiffs' request for review. See 34 C.F.R. § 300.512(c) (1981).

At the present time, Lester has an outstanding bill at Willowglen in the amount ofi $2,154.53.[9/] Because of the unpaid bill, Willowglen has issued a discharge notice to Lester which will become effective on March 25, 1982. The notice was issued on January 25, 1982. Plaintiffs, no longer feeling capable of waiting until their appeal was decided by ISBE, filed the instant action. Named as defendants were Ivan Pavkovic, Director of DMHDD, Edward Copeland, Chairman of ISBE, Dr. Ruth Love, Superintendent of CBE, Robert Mandeville, Director of the Illinois Bureau of Public Aid, Gregory Coler, Director of the Illinois Department of Children and Family Services, Robert Granzeier, Acting Director of the Illinois Department of Vocational Rehabilitation, Donald Gill, Illinois State Superintendent of Education, William Kempiners, Director of the Illinois Depart-

ment of Public Health, and Patricia Barger, an employee of DMHDD. Defendants Mandeville, Miller, Coler, Granzeier, Gill, Barger and Kempiners are members of GPCRB. This court's jurisdiction rests on 28 U.S.C. § 1331 (West Supp. 1981) and 20 U.S.C. § 1415(e) (1976). Currently before the court is plaintiff's motion for preliminary injunctive relief requiring defendants to pay Lester's outstanding bill so that Lester will not be discharged from Willowglen prior to trial on the merits.

I

While defendants agree that Lester is handicapped and entitled to the protections of the EHA, they do not agree that he has a private right of action to enforce the provisions of the Act by means of the instant suit. There is authority for the proposition that there is no private right of action, under the EHA,

to obtain judicial review on the merits of the decisions of state and local educational agencies regarding the provision of a free appropriate public education to handicapped children. See McCowen v. Hahn, No. 78 C 4233, slip op. at 8-11 (N.D. Ill. July 27, 1981); Miener v. Missouri, 498 F.Supp. 944 (E.D. Mo. 1980), rev'd in relevant part, No. 80-1971 (8th Cir. Feb. 4, 1982); Loughran v. Flanders, 470 F.Supp. 110, 114 (D. Conn. 1979). However, this position has been rejected by two courts of appeal, including the court of appeals for this circuit. See Miener v. Missouri, No. 80-1971, slip op. at 11 (8th Cir. Feb. 4, 1982); Anderson v. Thompson 658 F. 2d 1205, 1210 n. 7 (7th Cir. 1981).[10/] These cases hold that the EHA, in 20 U.S.C. § 1415 (1976), explicitly creates a private right of action, and permits plaintiffs in those actions to obtain

review on the merits, of the relevant educational agencies' decisions regarding the provision of a free appropriate public education to the plaintiffs.

In § 1415(b)(1)(E), the EHA requires that state and local educational agencies provide handicapped children and their parents with

> an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

Since the statute is phrased in the alternative, it is clear that the complaint can be addressed solely to the alleged failure to provide a free appropriate public education.[11/] Lester's parents presented such a complaint, and received a hearing as required by § 1415(b)(2), and then appealed as was their right under § 1415(c). Having taken these steps, Lester and his parents are explicitly provided with

> the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State couirt of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. Id. § 1415(e)(2).

The EHA explicitly provides both a right to present a complaint regarding the provision of a free appropriate public education for Lester, and to obtain review in this court in order to protect that right. See 121 Cong. Rec. 37414-16 (1975) (remarks of Sen. Williams); 121 Cong. Rec. 37031 (1975) (remarks of Rep. Mink). See also Sen. Rep. No.94-168, 94th Cong., 1st Sess. 26 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1450 (1975) [hereinafter cited as Sen. Rep.].[12/] Defendants' private right of action argument is without merit.[13/]

II

Closely related to the private right of action question is the question whether

plaintiffs have properly exhausted their administrative remedies as required by the EHA.[14/] Defendants do not argue the point. Nevertheless, the exhaustion question is sufficiently jurisdictional so as to require us to consider it on our own motion.

While § 1415(e)(2) of the EHA creates a private right of action, that right is only granted to a party "aggrieved" by the findings of the state agency. However, plaintiffs have not yet received a decision from ISBE on their appeal from the findings of the CBE hearing officer. This raises the question of whether plaintiffs are entitled to proceed in this court until ISBE has acted on their appeal, i.e., are they, as yet, "aggrieved."

Exhaustion of administrative remedies is not required under the EHA hwen their pursuit would be futile or meaningless

as a practical matter. 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams); Ezratty v. Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981); Monahan v. Nebraska, 645 F.2d 592, 597 (8th Cir.1981); H.R. v. Hornbeck, 524 F.Supp. 215, 219-22 (D. Md. 1981); Garrity v. Gallen, 522 F.Supp. 171, 220-21 (D.N.H. 1981); Sessions v. Livingston Parish School Board, 501 F.Supp. 251, 254 (M.D. La. 1980); Larry P. v. Riles, 495 F.Supp. 926, 963 (N.D. Cal. 1979); Doe v. Koger, 480 F.Supp. 225, 228 (N.D. Ind. 1979); Armstrong v. Kline, 476 F.Supp. 583, 601-02 (E.D. Pa. 1979), aff'd in part and remanded sub nom. Battle v. Pennsylvania, 629 F. 2d 269 (3d Cir. 1980), cert. denied, 101 S.Ct. 3123 (1981); Harris v. Campbell, 472 F.Supp. 51, 54 (E.D. Va. 1979); Loughran v. Flanders, 470 F.Supp. 110, 112 (D. Conn. 1979); New York Association for Retarded Childen, Inc. v. Carey, 466

F.Supp. 479, 486 (E.D. N.Y. 1978), aff'd, 612 F. 2d 644 (2d Cir. 1979). For two reasons, this doctrine applies to the instant case.

First, because of the press of time, plaintiffs have had no practical opportunity to obtain a decision from ISBE. They have done everything possible to obtain speedy administrative review, but have been unable to do so through no fault of their own. In fact, it is defendants who are at fault, because of their failure to decide plaintiffs' administrative appeal within the time specified by federal law. Moreover, the exhaustion rule of the EHA was intended to preserve the status quo by ensuring that no change in the child's placement occurs pending administrative appeal. See New York Association for Retarded Children v. Carey, 466 F.Supp. at 486, see generally 20 U.S.C. § 1415(e)(3) (1976); Stemple

v. Board of Education, 623 F. 2d 893 (8th Cir. 1980), cert. denied, 450 U.S. 911 (1981). Here, the purpose of the exhaustion requirement would be undermined by remanding plaintiffs to their administrative remedies, since it appears that they will be unable to obtain a decision before the time that Willowglen discharges Lester, and alters the status quo. When the press of time makes exhaustion impractical, it is not required by the EHA. See North v. District of Columbia Board of Education, 471 F.Supp. 136, 141 n. 8 (D.D.C. 1979).

Second, it appears that plaintiffs have no real administrative remedy in this case. Plaintiffs do not merely challenge a particular adjudicative decision made regarding Lester's individual needs. Rather, they challenge statewide policies regarding payment of the educational expenses of handicapped children

in Illinois. It is doubtful at best if the administrative review plaintiffs have yet to obtain can provide the relief plaintiffs seek, since it appears that ISBE, by adopting the policies in question, has already predetermined the result it will reach in Lester's case. This is especially true since many if not all of the actions defendants have taken in this case appear to be required by state law. See Ill. Rev. Stat. ch. 91 1/2, §§ 5-105 to 5-106, 5-116 (1979). Under these circumstances, exhaustion is not required. See Riley v. Ambach, 508 F. Supp. 1222, 1235-36 (E.D. N.Y. 1980), rev'd, No. 80-7600 (2d Cir. May 19, 1981).

III

In order to obtain preliminary relief, plaintiffs must demonstrate the presence of four factors: reasonable likelihood of success on the merits; that plaintiffs'

remedy at law is inadequate or that plaintiffs will be irreparably harmed if they fail to obtain preliminary relief; that the threatened injury to plaintiffs outweighs the threatened harm to defendants if the injunction does not issue; and that the granting of a preliminary injunction will serve the public interest. O'Connor v. Board of Education, 645 F.2d 578, 580 (7th Cir.), cert. denied, 102 S.Ct. 641 (1981).

A

On the merits, the essence of plaintiffs' claim is that defendants have abrogated their duty to provide Lester with a free appropriate public education by failing to meet fully the costs of Lester's placement at Willowglen. Under the EHA, it is clear that Lester has a right to a free appropriate public education. The statutory preamble states that, "It is the purpose of the Act to

assure that all handicapped children have available to them, within the periods specified . . . a free appropriate public education." Pub. L. No. 94-142, §3(a)(c), 89 Stat. 775 (1975). The Act goes on to state that participating states must provide a free appropriate public education to all children ages three to eighteen by September 1, 1978, and to all children ages three to twenty-one by September 1, 1980. 20 U.S.C. § 1412(2)(B) (1976). Local educational agencies in participating states are also required to provide a free appropriate public education. Id. §1414(a)(1)(C)(*ii). The legislative history makes it clear that Congress intended states to adhere to deadlines provided in the Act. See House Rep. No. 94-0168, 94th Cong., 1st Sess. 15 (1975); Sen. Rep., supra at 3, 17-18, 45, 1427, 1440-41, 1468. The history of the Act makes it clear that participat-

ing states "must have a policy in current effect which assures that all handicapped children have the right to a free appropriate public education." Sen. Rep. at 45, 1468 (emphasis in original). See House Rep. No.94-332, 94th Cong., 1st Sess. 15 (1975); 121 Cong. Rec. 37420 (1975) (remarks of Sen. Hathaway); 121 Cong. Rec. 37418 (1975) (remarks of Sen. Biden); 121 Cong. Rec. 37417 (1975) (remarks of Sen. Schweiker); 121 Cong. Rec. 37414 (1975) (remarks of Sen. Williams); 121 Cong. Rec. 37030 (1975) (remarks of Rep. Daniels); 121 Cong. Rec. 37028 (1975) (remarks of Rep. Ford); 121 Cong. Rec. 23704 (1975) (remarks of Rep. Brademas); 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams); 121 Cong. Rec. 19483 (1975) (remarks of Sen. Randolph). In sum, as one court stated, the mandate of the Act requiring the provision of a free appropriate public

education "is quite unequivocal." Tatro v. Texas, 625 F. 2d 557, 563 (5th Cir. 1980).[15/]

The requirement of a free appropriate public education includes the guarantee that when a handicapped child is placed at a residential facility such as Willowglen, the placement must be free to cost to the child's parents.

> If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child. 34 C.F.R. § 300.302 (1981).

See Sen. Conf. Rep. No. 94-455, 94th Cong., 1st Sess. 41, reprinted in [1975] U.S. Code Cong. & Ad. News 1480, 1494 (1975) [hereinafter cited as Conf. Rep.]; House Rep. No. 94-332, 94th Cong., 1st Sess. 18, 21 (1975); Sen. Rep., supra at 32, 1456; Riley v. Ambach, 508 F.Supp. 1222, 1244-47; rev'd on other grounds,

No. 80-7600 (2d Cir. May 19, 1981); Kreulle v. Biggs, 489 F.Supp. 169, 173 (D. Del. 1980); North v. District of Columbia Board of Education, 471 F. Supp. 136, 139-41 (D.D.C. 1979).

The provisions of a free appropriate public education must also include provision of "related services." 20 U.S.C. § 1401(18) (1976); see Tokarcik v. Forest Hills School District, 665 F.2d 443, 455-59 (3d Cir. 1981); Tatro v. Texas, 625 F.2d 557, 563-64 (5th Cir. 1980); Papacoda v. Connecticut, 528 F.Supp. 68 (D. Conn. 1981). The scope of the "related services" which must be provided is quite broad. See 20 U.S.C. § 1401(17) (1976).

> [T]he term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational

> therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evalution purposes. The term also includes school health services, social work services in schools, and parent counseling and training. 34 C.F.R. § 300.13(a)(1981).

Under the EHA, while the ultimate responsibility for assuring compliance with federal law rests with ISBE, see 34 C.F.R. § 300.600(1981), the Act's requirements also apply to all other state and local departments involved with the education of handicapped children. Id. §300.2(b).[16/]

There is no dispute that the outstanding bill for services provided to Lester at Willowglen involves the provision of special education and related services. There is also no dispute that placement at Willowglen was necessary and was necessary by DMHDD in order to provide Lester with special education and related services.

This being the case, the unambiguous mandate of federal law is that these services be provided at no cost to Lester's parents. While defendants' refusal to meet fully Lester's expenses may be authorized by state law, such laws are inconsistent with the mandate to provide an appropriate free public education, and cannot stand. See 20 U.S.C. §1412(6), 1414(a)(6) (1976); House Rep. No. 94-332, 94th Cong., 1st Sess. 29 (1975); Sen. rep. supra at 4, 1428.

Defendants launch a number of arguments which are entirely irrelevant to the case at hand. First, defendants argue that the members of GPCRB are not authorized under state law to provide plaintiffs with the relief they seek. That is exactly the problem. The nub of this case is that state law is inconsistent with the EHA. Since the GPCRB is bound by the EHA, it is the EHA itself

which requires the GPCRB to alter its practices, and protect plaintiffs' right to a free appropriate education education. The same is true of defendants' assertion that defendants Mandeville, Kempiners, Miller, Coler and Granzeier are not authorized by state law to provide plaintiffs with relief. Because they are involved with the education of handicapped children, they are required by the EHA to provide relief.

Second, defendants argue that Willowglen is at fault for its failure to be approved for funding before September, 1981, because Willowglen did not submit the proper budget forms. Assuming this is the case, Willowglen's default does not entitle defendants to deny Lester his right to a free appropriate public education. That right is absolutely guaranteed by federal law, there is nothing in the EHA authorizing defendants to nullify

plaintiffs' rights under the EHA because of actions of Willowglen entirely beyond plaintiffs' control. If defendants disapproved of Willowglen, they had the right to place Lester elsewhere. But the EHA will not countenance defendants' decision to place Lester at Willowglen, and then turn around and refuse to pay for the placement because of Willowglen's alleged derelictions. If defendants were to place Lester at Willowglen, they would also have had to guarantee that the placement was at no cost to Lester's parents. By placing Lester at an unapproved facility, defendants abrogated this duty.

Finally, defendants contend that the Parks' fears that New Hope would close were unjustified, and that the decision to remove Lester from New Hope was the Parks' and not defendants'. Assuming this to be the case, it never-

theless is also the case that CBE agreed to the removal, and that DMHDD itself placed Lester at Willowglen. Had CBE and DMHDD disagreed with the Parks' decision, it could have required them to keep Lester at New Hope pending administrative review. See 20 U.S.C. §1415(e)(3) (1976); Stemple v. Board of Education, 623 F.2d 893 (8th Cir. 1980), cert. denied, 450 U.S. 911 (1981). Defendants had no right to agree to the placement at Willowglen, only to then refuse to pay the full costs, deciding in retrospect that the placement was a mistake. Once Lester had been placed at Willowglen, defendants had a duty, under 34 C.F.R. § 300.302 (1981) and 45 C.F.R. § 84.33(c)(3) (1979), to ensure that the placement was at no cost to Lester's parents.

For the foregoing reasons, plaintiffs have demonstrated a reasonable likelihood of success on the merits.[17/]

B

The second element necessary for the issuance of a preliminary injunction is an inadequate remedy at law or irreparable injury. Lester will be discharged from Willowglen if he does not obtain preliminary relief by March 25, 1982. If discharged, Lester will suffer injury due to the loss of continuity in his education, the sort of injury difficult to measure and compensate through an award of money damages after trial on the merits. During the period in which a new placement is sought for Lester, he will be deprived of any education at all. This sort of deprivation often works serious and irreparable damages on a handicapped child. See Stanger v. Ambach, 501 F.Supp. 1237, 1243 (S.D. N.Y. 1980); Armstrong v. Kline, 476 F.Supp. 583, 596-500 (E.D. Pa. 1979), aff'd in part and remanded sub. nom. Battle v.

Pennsylvania, 629 F.2d 269 (3d Cir. 1980), cert. denied, 101 S.Ct. 3123 (1981); Stuart v. Nappi, 443 F.Supp. 1235, 1240 (D. Del. 1978). This sort of disruption is one of the evils the EHA seeks to avoid. See 121 Cong. Rec. 37024 (1975) (remarks of Rep. Perkins); 121 Cong. Rec. 37014 (1975) (remarks of Sen. Williams); Anderson v. Thompson, 658 F.2d 1205, 1212 (7th Cir. 1981); Stemple v. Board of Education, 623 F. 2d 893, 898 (8th Cir. 1980); cert. denied, 450 U.S. 911 (1981).

Defendants argue that there is no showing of irreparable injury, since Lester's parents may be able to afford to pay the current bill, and later seek damages after trial on the merits. However, there is absolutely nothing in the record whch supports this contention. To the contrary, it appears that Lester's father is currently unemployed and receiv-

ing workmen's compensation. Affidavit of Richard Parks ¶1.

Even if Lester's parents have an adequate remedy at law, Lester does not. Lester has his own right to a free appropriate public education, independent from that of his parents. Since Lester lacks the funds to pay the outstanding bill, the only way he can avoid discharge, short of obtaining preliminary relief here, is to obtain the funds from his parents. However, Lester has no way to ensure that he can obtain the funds. At most, Lester could sue his parents in state court in an attempt to compel them to provide the funds. It is far from clear that such a suit would be successful, and, in any event, it is virtually inconceivable that Lester could have a guardian appointed, retain separate counsel, institute suit and obtain relief prior to March 25. Because Lester has

no adequate remedy at law and faces irreparable injury, he is entitled to preliminary relief.

C

The harm to plantiffs that is threatened by the discharge from Willowglen outweighs the harm to defendants caused by the granting of a preliminary injunction. Whereas Lester will be irreparably injured if he does not obtain relief and is discharged, the threatened injury to defendants is not irreparable. Should defendants prevail at trial on the merits, they can seek recovery of any amounts paid to Willowglen either directly from Willowglen, or from Lester's parents. Moreover, a preliminary injunction imposes no undue burden on defendants, since it requires defendants to do no more than provide Lester with the free education which is his right under federal law.

D

Granting plaintiffs preliminary relief is in the public interest. When it enacted the EHA, Congress stated its conclusion that in the long run, the nation would be well-served by requiring states to assume the cost of providing handicapped children with a free appropriate education. Sen. Rep. supra at 9, 22, 1433, 1446; Howard S. v. Friendswood Independent School District, 454 F.Supp. 634, 641 (S.D. Tex. 1978). A preliminary injunction would further this public interest.

E

Plaintiffs have demonstrated the presence of the four elements necessary to obtain preliminary relief. Accordingly, we turn from the question of whether a preliminary injuction should issue, to the question of the type of preliminary relief plaintiffs should receive.

IV

There is a serious question whether the relief plaintiffs seek is barred by the eleventh amendment.[18/] While it has been clear since Ex parte Young, 209 U.S. 123 (1980) that a federal court may enjoin state officials to confrom their future conduct to the dictates of federal law, Quern v. Jordan, 440 U.S. 332, 337 (1979), the relief plaintiffs seek is not entirely prospective. The injuries they seek to redress were occasioned by the past failures of defendants to meet fully Lester's expenses, and the eleventh amendment applies to awards of such retroactive relief, even if the complaint seeks to characterize the relief as equitable or prospective. See Quern v. Jordan, 440 U.S. at 337, Edelman v. Jordan, 415 U.S. 651, 668-69 (1974). Nor do plaintiffs avoid the reach of the eleventh amendment by virtue of the

fact that they had not sued the state itself, but only officers of the state, and have named them in their official and individual capacities. This action is really against the state, since it challenges the actions of defendants in their official capaciities as office-holders, rather than any individual action taken by a given defendant. See Scheur v. Rhodes, 416 U.S. 232, 237-38 (1974); Miener v. Missouri, No. 80-1971, slip op. at 23-25 (8th Cir. Feb. 4, 1982). Moreover, it is clear that any recovery plaintiffs obtain will be paid from the state treasury, so that the state is the real party in interest, and entitled to the protections of the eleventh amendment. See Edleman v. Jordan, 415 U.S. at 663, 668.

Unless the State of Illinois' eleventh amendment immunity has been abrogated in some way, plaintiffs may not obtain

the relief to which they would otherwise be entitled. However, the EHA may very well have worked such an abrogation. It is well-settled that Congress, acting pursuant to its power to enforce the fourteenth amendment, see U.S. Const. amend. XIV, §5, can abrogate the states' eleventh amendment immunity. See Maher v. Gagne, 448 U.S. 122, 132-33 (1980); Hutto v. Finney, 437 U.S. 679, 693 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).[19/] Therefore, the question is whether Congress, in enacting the EHA, used its fourteenth amendment enforcement powers to abrogate the states' eleventh amendment immunity.

It is clear that Congress enacted the EHA pursuant to its power to enforce the fourteenth amendment. In its statement of findings, Congress stated that "it is in the national interest that the Federal Government assist State and local

efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." Pub. L. No. 94-142, 89 Stat.775 (1975) (emphasis suplied)[20/] The House Report states that "Congress has the responsibility to assure equal protection of the laws and thus to take action to assure that handicapped children have available to them appropriate educational services." House Rep. No. 94-332, 94th Cong., 1st Sess. 19 (1975). One of the sponsors of the Act explained,

> The Constitution provides that all people shall be treated equally, but we know that, while all youngsters have an equal right to education, those who live with handicaps have not been accorded this right. This measure fulfills the promise of the Constitution that there shall be equality of education for all people, and that handicapped children no longer will be left out. 121 Cong. Rec. 37413 (1975) (remarks of Sen. Williams).

On the date of passage in the Senate, another sponsor said of the passage of EHA, "This is the day that handicapped children and their parents can point to and say that this Congress -- their Congress -- recognized as a matter of national policy, the equal protection under the law that they have always deserved." 121 Cong. Rec. 37411 (1975) (remarks of Sen. Stafford). To similar effect, see 121 Cong. Rec. 37417 (1975) (remarks of Sen. Schweiker); 121 Cong. Rec. 37417 (remarks of Sen. Javits); 121 Cong. Rec. 37029 (1975) (remarks of Rep. Michel); 121 Cong. Rec. 23,705 (1975) (remarks of Rep. Jeffords); 121 Cong. Rec. 37704 (1975) (remarks of Rep. Brademas).[21/] Finally, the Senate Report forcefully indicates that Congress intended to create an enforceable equal protection right in the EHA.

Parents of handicapped children all too frequently are not

> able to advocate the rights of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives. However, over the past few years, parents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution. It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy. It is this Committee's belief that the Congress must take amore active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. S. 6 takes positive necessary steps to ensure that the rights of children and their families are protected. Sen. Rep., supra at 9, 1433.

See also, id. at 13, 22-23, 1437, 1446-47.

In order to enforce the rights created by the EHA, Congress gave the parents or guardian of a handicapped child the right to file complaints regarding any

matter relating to the provision of a free appropriate public education to their child against those responsible for the provision of the child's education. See 20 U.S.C. §1415(b) (1976). If the administrative remedy does not prove satisfactory, the parents or guardian may bring a civil action in federal district court, and the court then "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." Id. §1415(e)(2). The statute plainly empowers plaintiffs to sue state and local officials who fail to provide a free appropriate public education, and permits courts to grant relief subject only to the limitation of appropriateness.22/

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court held that Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e to 2000e-17 (1976) abrogated eleventh amendment immunity, since the statute was passed pursuant to Congress' power to enforce the fourteenth amendment, and "because the statute made explicit reference to the availability of a private action against state and local governments . . . . " Quern v. Jordan, 440 U.S. 332, 344 (1979). The Court held that, while the statute contained no specific language abrogating eleventh amendment immunity as such, the statutory history which focused on the question of state liability demonstrated that Congress intended states to be subject to liability. Id. at 345. The Court did not require any explicit statement either in the statute or the legislative history that eleventh amendment

immunity would be abrogated, since there was no such statement in the history or text of Title VII. See Field, The Eleventh Amendment and other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203, 1248-52 (1978).[23/]

The EHA, just like Title VII, explicitly authorizes actions against state and local governments. It creates a clear duty to provide a free appropriate public education on the part of state and local governments, gives parents the right to complain when that duty is breached, and to obtain review of their complaints in federal courts, which may then order "all apropriate relief." Just as in Title VII, there is a clear statutory history which focuses on the question of state liability, and determines that states should be required to assume the expense of providing a free appropriate public education, and that parents should

have access to federal courts in order to air their complaints regarding failure to provide such an education. Congress has plenary power to enforce the fourteenth amendment by limiting the principle of sovereign immunity contained in the eleventh amendment, and imposing liability for damages on states. Fitzpatrick v. Bitzer, 427 U.S. at 456. What is required is a clear indiction that Congress has considered the federalism interests protected by the eleventh amendment, and determined that they should give way. See Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv. L. Rev. 682, 694-96 (1976). See also Nowak, The Scope of Congressional Power to Create Causes of Action against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev.

1413, 1441-42 (1975). That is present in the EHA.

The legislative history of the EHA indicates that Congress carefully considered the role of the states in providing education for the handicapped, and determined that the requirements of equal protection demand that states assume the burden of educating the handicapped. Congress focused specifically on the question of state liability, and determined that states must assume these expenses by the dates specified in the Act, and that the handicapped ought to be able to judicially enforce this obligation by obtaining review of their complaints regarding the right to a free appropriate public education. Congress explicitly provided that states assume these costs, and that courts have all necessary power to enforce this obligation, subject only to the limitation that the relief ordered

be appropriate. To hold that damages cannot be awarded even when "appropriate" under the Act would be to subvert the clear congressional intent to impose liability on sttes for "all appropriate relief". Congress, in the EHA, has directed states to assume the costs at issue here, through its power to enforce the fourteenth amendment.[24/] We hold that the EHA abrogates the eleventh amendment immunity of the states.

Thus far, we have assumed that the abrogation of eleventh amendment immunity under the EHA can only be found if the evidence of congressional intent is clear and convincing. However, it may be that not even that much is required. The Court appears to have rejected the necessity for a "clear statement rule" and imposed a lesser standard for finding congressional intent to abrogate eleventh amendment immunity when Congress is acting

under its power to enforce the fourteenth amendment. See Hutto v. Finney, 437 U.S. 678, 698 n. 31 (1978). This lesser standard makes sense. The justification for a "clear statement rule" is that courts should not lightly infer that Congress intends to infringe constitutional rights of the states, because of the respect the eleventh amendment demands for state sovereignity.

> It would [] be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without ... indicating in some way by clear language that the constitutional immunity was swept away. It is not easy to infer that Congress, in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under the Constitution. Employees v. Department of Health and Welfare, 411 U.S. 279, 285 (1973).

Here, Congress is acting under the fourteenth amendment, and not its aticle

I powers. When Congress acts under the fourteenth amendment, the protection of state sovereignty is of lesser force, since Congress cannot protect state sovereignty without limiting another constitutional interest, and because the fourteenth amendment itself is a limit on state sovereignty. "[T]he Eleventh Amendment, and the principle of state sovereignty which it imbodies . . . are necessarily limited by the enforcement provisions of the Fourteenth Amendment." Hutto v. Finney, 437 U.S. at 698 n. 31 (quoting Fitzpatrick v. Bitzer, 427 U.S. at 456). Under the relaxed standard for finding abrogation of immunity that is appropriawte for this case, the conclusion that the EHA abrogates state immunity is even clearer.

Our conclusion is reinforced by the opinion in Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981). There

the court stated that the availability of damages under the EHA was solely a question of statutory construction, see id. at 1210, and that damages were recoverable for a failure to provide an appropriate edcuational palcement for a handicapped child under certain circumstances, see id. at 1213-14. This was despite the presence fo a state defendant.[25/] Similarly, a number of other courts hve treated the availability of damages under the EHA as solely a statutory matter, and found damages recoverable when authorized by the statute. See, e.g., Town of Burlington v. Department of Education, 655 F.2d 428, 432-34 (1st Cir.1981); Foster v. District of Columbia Board of Education, 523 F.Supp. 1142, 1146 (D.D.C. 1981); Monahan v. Nebraska, 491 F.Supp. 1074, 1094 (D. Neb. 1980), aff'd in part and rev'd in part on other grounds, 645 F.2d 592 (8th Cir. 1981); Boxall v.

Sequoia Union High School District, 464 F.Supp. 1104, 112 (N.D. Cal. 1979).[26/] It is true that there is substantial authority for the conclusion that the eleventh amendment does bar an award of damages under the EHA. See Miener v. Missouri, No. 80-1971, slip op. at 25-26 (8th Cir. Feb. 4, 1982); Tatro v. Texas, 516 F.Supp. 968, 973 (N.D. Tex. 1981); Riley v. Ambach, 508 F.Supp. 1222, 1248 (E.D. N.Y. 1980), rev'd on other grounds, No. 80-7600 (2d Cir. May 19, 1981); Hark v. School District of Philadelphia, 505 F.Supp. 727, 731 (E.D. Pa.1980); M.R. v. Milwaukee Public Schools, 495 F.Supp. 864, 867 (E.D. WI. 1980); Stubbs v. Kline, 463 F.Supp. 110, 114-15 (W.D. Pa. 1978); see generally Ezratty v. Puerto Rico, 648 F.2d 770, 776-77 (1st Cir. 1981) (dictum). However, these cases do not examine the interaction between the eleventh and fourteenth amend-

ments and the EHA. All but Miener ignore the fourteenth amendment question completely. Because the EHA was enacted pursuant to Congress' power to enforce the fourteenth amendment, and because Congress provided that federal courts award "all appropriate relief," we conclude that the Anderson court was correct to state the issue solely as one of statutory construction: is the relief sought by plaintiffs "appropriate" under the Act? It is to that question that the court now turns.27/

V

As noted above, the relief plaintiff seek is, in essence, an award of money damages. This raises the question of whether such relief is authorized by the EHA.

The statute is relatively silent on this question. It merely provides that the district court "shall grant

such relief as it determines is appropriate." 20 U.S.C. §1415(e)(2) (1976). The legislative history is also relatively silent on this question. The history does indicate, however, that judicial power to order relief is rather broad.

> The provisions of existing law with respect to judicial action are clarified and strengthened to assure that any party aggrieved by the findings and decision rendered in the due process hearing or the State educational agency review of such hearing shall have the right to bring a civil action with respect to the original complaint and matters relating thereto. Such action may be brought in any State cout of competent jurisdiction or in a district court of the United States and in any such action the court shall receive the records of the due process hearing (and where appropriate the records of the review of such hearing), shall hear additional evidence at the request of any party, shall make an independent decision based on a preponderance of the evidence and shall grant all appropriate relief. Conf. Rep. supra at 50, 1503.

To similar effect, see 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams). This is consistent with the long-standing rule that federal courts have broad power to shape relief.

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. Bell v. Hood, 327 U.S. 678, 684 (1946) (footnotes omitted).

In Anderson v. Thompson, the Seventh Circuit dealt with the nature of "appropriate relief" under the EHA. The court held that, in the case of an erroneous placement of a child in a facility not suited to her needs, damages are not appropriate relief. This result was followed in Miener v. Missouri, No. 80-1971, slip op. at 20-22 (8th Cir. Feb.

4, 1982). However, the court did not erect an ironclad rule prohibiting damages in EHA cases; it acknowledged that damages were recoverable when necesary in order to protect rights under the Act. See 658 F.2d at 1213-14. The factors mentioned in Anderson as being relevant to the determination whether dmages are appropriate relief under the EHA indicate that plaintiff should be able to recover damages in this case.

First, the Anderson court examined whether damages were necessary to eliminate the harm to the plaintiff caused by the defendants' violation of the Act. It noted that when a child is placed in a program unsuitable for his needs, the harm is eliminated by injunctive relief alone, requiring placement in a suitable program. 658 F.2d at 1210-11. Thus, injunctive relief results in the provision of a free appropriate public education.

Here, however, the harm can only be eliminated by an award of damages. If Lester's bill is not paid, he will be discharged from Willowglen and deprived of education. As long as defendants do not pay the outstanding bill, the education Lester has received is not "free". Thus, while claims that the education provided a child is free but not appropriate can be adequately addressed by injunctive relief, claims that the education has been appropriate but not free can only be dealt with by an award of damages.

Second, in Anderson the court noted that Congress envisioned that the right to an appropriate education would be guaranteed by procedural safeguards and not awards of damages, and concluded that an award of damages was not part of the remedial mechanism set up by the Act. 658 F.2d at 1212. To use the words of the district court,

> Section 1415 is aimed at establishing procedures to obtain an appropriate placement and program for a child with exceptional needs and not at compensating the child for past deficiencies in the provision of a special education. Anderson v. Thompson, 495 F.Supp. 1256, 1269 (E . 1980), aff'd, 658 F2.d 1205 (7th Cir. 1981).

However, with respect to a failure to provide a free education, the only remedial mechanism possible is an award of damages. The child's right to an appropriate placement is protected by remedial devices short of damage award, and so there is no need to provide additional compensation. However, in this case, an "appropriate placement and program" cannot be given to Lester unless defendants are ordered to pay his past bills so that he remains at Willowglen.

Third, the court noted that an award of damages would place undue burdens on states and localities. Diagnosis and placement of handicapped children

into approrpiate programs is a business fraught with uncertainity; the court noted that it would be improper to subject officials to liability for a decision which cannot be reviewed with certainty, and in a field where mistakes are inevitable, 658 F.2d at 1212, and the imposition of liability might deter school systems from experimenting with innovative diagnostic programs. Id. at 1213. Moreover, calculating a money figure for the damage caused because a child was not in a suitable program is dif .cult if not impos- ible, and where damages are not readily measurable, there is good reason to conclude that they should not be considered appropriate under th eact. See Campbell v. Talladega County Board of Education, 518 F.Supp. 47, 56-57 (N.D. Ala. 1981). None of these factors is present in the instant case. The practices of defendants that are challenged here involve no un-

certain medical judgments; only the reimbursement policies of defendants are challenged. No deterrence of innovative medical or rehabilitative procedures is threatened, since liability would not be imposed because of any medical or educational decision of the state. Plaintiffs only seek to require defendants to pay for a placement which all parties concede is appropriate.

In sum, Anderson indicates that an award of damages is appropriate in this case. While the right to an appropriate placement can be protected simply by providing prospective injunctive relief, without getting into nice questions about whether liability should be imosed for difficult diagnostic decisions, and if so, how much, the right to a free education cannot be protected without ordering the state to pay for the education it provides. If Lester does not receive

the relief he seeks, he will be discharged from Willowglen, and deprived of the free appropraite public education which is his right under the Act. Accordingly, we follow those cases which have held that damages are recoverable under the EHA in situations similar to that presented here. See, e.g., Town of Burlington v. Department of Education, 655 F.2d 428, 432-34 (1st Cir. 1981); Foster v. District of Columbia Board of Education, 523 F.Supp. 1143, 1146 (D.D.C. 1981) (dictum); Monahan v. Nebraska, 491 F. Supp. 1074, 1094 (D. Neb. 1980), aff'd in part and rev'd in part on other grounds, 645 F.2d 592 (8th Cir. 1981); Boxall v. Sequoia Union High School District, 464 F.Supp. 1104, 1112 (N.D. Cal. 1979)[28/]

VI

Plaintiff have demonstrated that they are entitled to preliminary relief. However, the court is cognizant that

if plaintiffs obtain the preliminary relief that they seek, they will have obtained most of the relief they ultimately seek in this case prior to trial on the merits. Ordinarily, this is not a preferred result. Therefore, defendants will be preliminarily enjoined to provide Willowglen with sufficient assurances regarding the payment of the outstanding bill for services rendered to Lester Parks so that Willowglen will not discharge Lester Parks because of the unpaid bill. If defendants can provide assurances, short of actually paying the outstanding bill, sufficient to prevent Lester's discharge, then they will have complied with the preliminary injunction. However, if nothing short of payment in full will satisfy Willowglen, defendants will be required by the preliminary injunction to make the payment.

Accordingly, the judgment of this Court is that plaintiffs' motion for a preliminary injunction should be and hereby is granted, and that defendants should be and hereby are preliminarily enjoined to make assurances to Willowglen that they will pay the outstanding bill for services rendered to Lester Parks sufficient to prevent Willowglen from discharging Lester Parks. The injunction will issue without security.[29/] The preceding will serve as findings of fact and conclusions of law and the reasons for the decision for purposes of Fed. R. Civ. P. 52(a) and 65(d).

Enter:

_____
Prentice H. Marshall
United States District Judge

Dated: March 19, 1982

1/ Plaintiffs also seek to represent the class of all persons similarly situated. The parties have indicated that they wish to engage in discovery before presenting the question of class certification to the court.

2/ There is some dispute, largely irrelevant to the issues presented by this case, as to whether Lester's parents' fears were justified.

3/ In addition to the policies mentioned in text, plaintiffs also allege that CBE unlawfully fails to place handicapped children in residential facilities within a reasonable time, and delays funding applications, and that the Illinois State Board of Education unlawfully refuses to meet time deadlines for deciding hearings and appeals related to such placements. However, the questions raised by these allegations need not be answered in order to provide plaintiffs with the preliminary relief now sought.

4/ Section 504 prohibits discrimination against otherwise qualified handicapped individuals. Since we conclude below that the bulk of the relief plaintiffs seek under § 504 is barred by the eleventh amendment, the bulk of the discussion in this opinion will concern the EHA, and not §504.

5/ The record does not reveal what DMHDD"s policy subsequent to January 1, 1982 is.

6/ While the complaint does not make the matter entirely clear, it appears that the 1981 rate is inadequate to meet Lester's current actual expenses.

7/ It is unclear whether the decision requires CBE to assume those costs which the state defendants assess to plaintiffs.

8/ There is no allegation that plaintiffs are at fault for the delay. The parties appear to agree that the delay was caused by CBE's failure to provide plaintiffs with a copy of the hearing transcript in a timely fashion.

9/ While there is some dispute as to the precise amounts of money in each category which defendants have refused to assume, defendants have not as yet denied that the total outstanding bill at Willowglen comes to $2,154.53, or that Lester will be discharged if the bill is not paid by March 25, 1982. Lester also has a bill from Bell Therapy for speech therapy outstanding in the amount of $222.52. However, it appears Lester is currently receiving all the speech therapy he needs, and has no need for preliminary relief regarding that amount.

10/ While the Anderson court dealt with the issue only briefly, the private right of action question was argued at some length by the defendant-appellees. See Brief for Defendant-Appellee, School Board at 8-18, Anderson v. Thompson, 658 F. 2d 1205 (7th Cir. 1981).

11/ See also Sen. Conf. Rep. No. 94-455, 94th Cong., 1st Sess. 49 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1480, 1502 (1975).

12/ Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) held that the Developmentally Disabled Assistance and Bill of Right Act, 42 U.S.C.

§§6000-81 (1976 & Supp. II 1978) did not create judicially enforceable rights for the developmentally disabled. However, that statute contained no provision expressly authorizing district courts to engage in review under the Act. Thus, the statute bears little resemblance to the EHA.

13/ In this circuit, it is settled that there is a private right of action under § 504 of the Rehabiliation Act, at least for injunctive relief. See Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977).

14/ We will assume arguendo that exhaustion is also required under the Rehabiliation Act, though that is far from clear.

15/ Exactly how unequivocal the mandate is is demonstrated by the fact that Congress explicitly stated that states may not use lack of available funds as a justification for failure to provide free appropriate public education. For example, the Senate Report states,

> The Committee rejects ther argument that the Federal Government should only mandate services to handicapped children if, in fact, funds are appropriated in sufficient amounts to cover the full cost of this education. The Committee recognizes the State's primary responsibility to uphold the Constitution of the United Sttes and their own State Constitutions and State laws as well as Congress' own responsibility under the 14th Amemdment to assure equal protection of the law. Sen. Rep. at 22, 1446.

To similar effect, see 121 Cong. Rec. 37025 (remarks of Rep. Mink); 121 Cong. Rec. 19503 (1975) (remarks of Sen. Cranston).

16/ The Rehabilitation Act also requires the provision of a free appropriate public education at Willogwlen to Lester. See 45 C.F.R. § 84.33 (1979). The Act applies to all defendants in this case. See id. §§84.2, 84.3(f).

17/ One court has specifically held that the EHA prohibits the imposition of a "responsible relative liability." See In re Jones, 98 Misc. 2d 562 414 N.Y.S. 2d 258 (Fam. Ct. 1979).

18/ The eleventh amendment does not bar relief against defendant Love. As a municipal official, she does not enjoy the protection of the eleventh amendment. See Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979); Monell v. Department of Social Services, 436 U.S. 658, 690 n. 59 (1978).

19/ For an explication of the basis of a congressional power to abrogate eleventh amendment immunity, see Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413, 1422-41, 1460-64 (1975); Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv. L. Rev. 682, 694-96 (1976).

20/ Congress was well aware of the significance of the last phrase. See Conf. Rep. at 28-29, 1482.

21/ Congressional intent to use the EHA as an enforcement mechanism for the fourteenth amendment rights of the handicapped can also be seen in the numerous statements that the EHA was designd to enforce various court decisions which had found a right to an appropriate public education for the handicapped under the fourteenth amendment. See House Rep. No. 94-332, 94th Cong. , 1st Sess. 3-5, 19 (1975); Sen. Rep. at 5-9, 1429-33; 121 Cong. Rec. 37030 (1974) (remarks of Rep. Mink); 121 Cong. Rec. 37027 (1975) (remarks of Rep. Gude); 121 Cong. Rec. 37025 (1975) (remarks of Rep. Brademas); 121 Cong. Rec. 37025 (1975) (remarks of Rep. Perkins); 121 Cong. Rec. 23,706-07 (1975) (remarks of Rep. Quie); 121 Cong. Rec. 23,703-04 (1975) (remarks of Re. Brademas); 121 Cong. Rec. 19505 (1975) (remarks of Sen. Humphrey); 121 Cong. Rec. 19504 (1975) (remarks of Sen. Schweiker); 121 Cong. Rec. 19485 (1975) (remarks of Sen. Williams).

22/ See also Part I, supra.

23/ In fact, as Professor Field has noted,it would be utterly unrealistic to require such an explicit statement in a statute's legislative history before concluding that Congress intended to abrogte eleventh amendment immunity. See id. at 1272. See generally Hutto v. Finney, 437 U.S. 678, 696-97 (1978).

24/ Defendants do not challenge the EHA's constitutionality on the ground that it is not a proper exercise of congressional power under U.S. Const. amend. XIV, §5.

25/ Had the court seen an eleventh amendment problem, it would have been

required to raise the question on its own motion, since the matter is jurisdictional. See Edelman v. Jordan, 415 U.S. 651, 677-78 (1974).

26/ It is instructive to compare the EHA to 42 U.S.C. § 1983 (1976) which was held not to abrogate sovereign immunity in Quern v. Jordan, 440 U.S. 332 (1979) and Edelman v. Jordan, 415 U.S. 651 (1973). Section 1983 does not refer explicitly to the imposition of liability on states, it refers only to persons acting under color of state law. Section 1983 does not contain "the threshold fact of congressional authorization to sue a class of defendants which literally included states," 415 U.S. at 672, and focuses only on the liability of persons, which is insufficient to abrogate the immunity of states, see 440 U.S. at 342-45. The history of § 1983 reinforces the conclusion that it was not intended to abrogate eleventh amendment immunity, see Nowak, supra at 1464-68. The EHA is much different. Its text and history focuses on the duties of states, not simply their officers. The statute creates a legal duty on the part of states, and makes the duty judicially enforceable. This is the critical difference between § 1983, Edelman and Quern on the one hand, and Fitzpatrick and the EHA on the other. See Field, supra at 1247-48.

It is also worth noting that in the EHA, Congress vested jurisdiction in the district courts "without regard to the amount in controversy." 20 U.S.C. § 1415(e)(4) (1976). This language seems to envision actions for damages.

27/ For the same reason that the eleventh amendment does not bar an award

of damages under the EHA, it does bar an award under § 504 of the Rehabilitation Act. Neither the text nor the history of the Act evinces an intent to authorize an award of damages, nor is there evidence in the legislative history that Congress focused on the question of state liability and determined that the federalism interests at stake should give way. Plaintiffs may obtain prospective relief only under § 504. See Patton v. Dumpson, 498 F. Sup. 933, 935 n. 1 (S.D. N.Y. 1980); Stubbs v. Kline, 463 F. Supp. 110 (W.D. Pa. 1978).

28/ The only portion of the Anderson opinion which tends to argue that damages should not be awarded in a case such as this is the language indicating that damage actions might unduly burden state budgets. See 658 F.2d at 1212-13. However, reliance on this language proves too much. Congress required states to assume the cost of providng a free appropriate public education to every child, and imposed inflexible time deadlines for doing so. See Part III-A, supra. The EHA was designed to ensure that the goal was met. See, e.g , Pub. L. No. 94-142, § 3(a), 89 Stat 775 (1975); Sen. Rep. at 7-9, 1431-33; 121 Cong. Rec. 37025 (1975) (remarks of Rep. Perkins); 121 Cong. Rec. 37025 (1975) (remarks of Rep. Brademas). Damage relief in this case imposes no fiscal burden which Congress did not intend states to assume as of September 1, 1978. See 20 U.S.c. § 1412(2)(b) (1976).

29/ Since we have granted plaintiffs the relief they seek on statutory grounds, we need not reach the constitutional arguments they advance.

Supreme Court, U.S.
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CLERK

No. 84-1919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD PARKS, et al.,

Cross-Petitioners,

vs.

MICHAEL A. BELLETIRE, et al.,

Cross-Respondents.

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether retroactive monetary damages are a part of the "appropriate relief" which may be granted against a State under the EHA, 20 U.S.C. § 1415(e)(2), or whether such damages are barred by the eleventh amendment.

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ARGUMENT

RETROACTIVE MONETARY DAMAGES AGAINST A STATE UNDER THE EHA ARE BARRED BY THE ELEVENTH AMENDMENT

The Seventh Circuit's refusal to award retroactive monetary damages in this case does not "conflict directly" with this Court's recent decision in *Burlington School Committee of Town of Burlington Massachusetts v. Dept. of Education*, ____ U.S. ____, 105 S. Ct. 1996 (1985). While it is true that *Burlington School Committee* holds that damages can be appropriate relief under the EHA, it does not address the issue of whether such damages would be barred by the eleventh amendment—an issue

not relevant in that case because damages were only awarded against the town of Burlington.

The question whether an award of damages is barred by the eleventh amendment is completely separate from the question of whether a damages award is authorized. *Cf. Campbell v. Talladega County Bd. of Education*, 518 F. Supp. 47, 56-57 (N.D. Ala. 1981) (damages awardable under § 504 of the Rehabilitation Act but barred by impossibility of measurement and by eleventh amendment). School boards of smaller political subdivisions, such as counties or cities, do not occupy the same position as a State for eleventh amendment purposes. *Mount Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274, 280 (1977); *Edelman v. Jordan*, 415 U.S. 651, 667 n. 12 (1974). The eleventh amendment therefore does not preclude the award of damages against such school districts. Accordingly, this Court's recent decision in *Burlington School Committee* could not be controlling on this issue.

Moreover, this Court has already found that the EHA was enacted pursuant to Congress' authority to legislate under the spending power, *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 190 n. 11, 204 n. 26 (1982), so it could not properly be viewed as a congressional waiver of the States' eleventh amendment immunity. Congress may abrogate this immunity under § 5 of the fourteenth amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), but this legislation was not enacted to enforce the fourteenth amendment.

Additionally, it is well settled that abrogation of a State's immunity will not be implied, but must be clearly and unequivocally expressed, as evidenced by language in the statute or persuasive legislative history. *Quern v.*

Jordan, 440 U.S. 332, 345 (1979). Even assuming *arguendo* that the EHA was passed pursuant to the fourteenth amendment, there is no evidence that this Act was intended by Congress to waive the states' immunity from retroactive damage awards. Therefore, the EHA did not waive Illinois' eleventh amendment immunity, which barred the retroactive monetary relief sought by the plaintiffs in this case.

CONCLUSION

For the foregoing reasons the Respondents submit that this Cross-Petition for a Writ of Certiorari should be denied.

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